No. 17-21	
Title:	**Fane Lozman, Petitioner** **v.** **City of Riviera Beach, Florida**
Docketed:	June 30, 2017
Linked with 16A1100	
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Numbers:	(15-10550)
Decision Date:	February 28, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
May 09 2017	Application (16A1100) to extend the time to file a petition for a writ of certiorari from May 29, 2017 to June 28, 2017, submitted to Justice Thomas.
May 15 2017	Application (16A1100) granted by Justice Thomas extending the time to file until June 28, 2017.
Jun 28 2017	Petition for a writ of certiorari filed. (Response due July 31, 2017)
Jul 28 2017	Brief amicus curiae of Institute for Justice filed.
Jul 28 2017	Waiver of right of respondent Riviera Beach, FL to respond filed.
Jul 31 2017	Brief amicus curiae of First Amendment Foundation filed.
Aug 09 2017	DISTRIBUTED for Conference of 9/25/2017.
Aug 10 2017	Response Requested. (Due September 11, 2017)
Aug 16 2017	Order extending time to file response to petition to and including October 11, 2017.
Oct 11 2017	Brief of respondent Riviera Beach, FL in opposition filed.

Oct 18 2017	DISTRIBUTED for Conference of 11/3/2017.
Oct 18 2017	Reply of petitioner Fane Lozman filed. (Distributed)
Nov 06 2017	DISTRIBUTED for Conference of 11/9/2017.
Nov 13 2017	Petition GRANTED.
Dec 19 2017	Blanket Consent filed by Petitioner, Fane Lozman **Blanket Consent**
Dec 20 2017	SET FOR ARGUMENT ON Tuesday, February 27, 2018
Dec 22 2017	Joint appendix filed. **Main Document** **Proof of Service**
Dec 22 2017	Brief of petitioner Fane Lozman filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 27 2017	Brief amici curiae of Roderick and Solange MacArthur Justice Center filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 27 2017	Brief amici curiae of Marion B. Brechner First Amendment Project, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 29 2017	Brief amici curiae of First Amendment Foundation, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 29 2017	Brief amici curiae of Institute for Justice, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 29 2017	Brief amicus curiae of Institute for Free Speech filed. **Main Document** **Certificate of Word Count** **Proof of Service** **Other**
Dec 29 2017	Brief amici curiae of National Press Photographers Association and 25 Media and Free Speech Organizations filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 05 2018	CIRCULATED
Jan 09 2018	Motion of respondent for an extension of time filed. **Main Document**

Jan 10 2018	Record requested from the U.S.C.A. 11th Circuit.
Jan 11 2018	Motion to extend the time to file respondent's brief on the merits granted, and the time is extended to and including January 26, 2018. Amicus briefs in support of respondent are to be filed on or before January 29, 2018.
Jan 22 2018	Record received from the U.S.D.C. Southern District of Florida (West Palm Beach) is electronic.
Jan 24 2018	Record from the U.S.D.C. Southern District of Florida. (1 Envelope).
Jan 26 2018	Brief of respondent Riviera Beach, FL filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 26 2018	Brief amicus curiae of State of Alaska filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2018	Brief amicus curiae of United States filed. (Distributed) **Proof of Service** **Main Document**
Jan 29 2018	Brief amici curiae of District of Columbia, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2018	Brief amici curiae of National Association of Counties, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 02 2018	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Feb 16 2018	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 16 2018	Reply of petitioner Fane Lozman filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 27 2018	Argued. For petitioner: Pamela S. Karlan, Stanford, Cal. For respondent: Shay Dvoretzky, Washington, D. C.; and Jeffrey B. Wall, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

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RECORD AND BRIEFS

17-21

No. 17-___

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IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that a plaintiff who claims he was subject to a retaliatory prosecution in violation of the First Amendment must plead and prove the absence of probable cause for the prosecution. The Court subsequently granted certiorari in *Reichle v. Howards*, 566 U.S. 658 (2012), to determine whether that rule should be extended to claims of retaliatory arrest as well. But the Court left that question unanswered, instead resolving the case on grounds of qualified immunity.

This case presents the question *Reichle* reserved:

Does the existence of probable cause defeat a First Amendment retaliatory-arrest claim as a matter of law?

PARTIES TO THE PROCEEDING

Petitioner (plaintiff below) is Fane Lozman. Respondent is the City of Riviera Beach, Florida.

Michael Brown, Gloria Shuttlesworth, Norma Duncombe, Vanessa Lee, Elizabeth Wade, Ann Iles, George Carter, and the City of Riviera Beach Community Redevelopment Agency were also named defendants in the district court. On petitioner's motion, the district court dismissed his claims against these defendants, *see* Pet. App. 23a, who were not parties in the Court of Appeals and therefore are not respondents here.

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Lozman v. City of Riviera Beach,
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Rankin v. Evans,
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Reichle v. Howards,
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Scheuer v. Rhodes,
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Smiddy v. Varney,
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Stone v. Juarez,
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United States v. Miller,
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Whren v. United States,
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Other Authorities

Activist Arrested at Riviera Beach City Council Meeting, YouTube (Sept. 15, 2009), https://tinyurl.com/lbj5qqj 5
Berman, Mark, *ACLU, Other Groups Sue Baton Rouge Police and Accuse Them of Violating Protesters' Rights*, Wash. Post (July 13, 2016) 17
Blum, Karen, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments*, 29 Touro L. Rev. 633 (2013) 11
Cobert, Beth, "*Banning the Box*" in *Federal Hiring*, U.S. Off. of Personnel Mgmt.: Director's Blog (Apr. 29, 2016) 31

Friedersdorf, Conor, *The Significance of Millions in the Street*, Atlantic (Jan. 23, 2017) 17

Harris, David A., *"Driving While Black" and All Other Traffic Offenses*, 87 J. Crim. L. & Criminology 544 (1997) 28

Kennedy, Randall, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999 (1989) 16, 17

Police Exec. Research Forum, *Police Management of Mass Demonstrations* (2006) 18

Robbins, Liz, *Tax Day Is Met with Tea Parties*, N.Y. Times (Apr. 15, 2009) 17

Silvergate, Harvey A., *Three Felonies a Day* (2009) 28

Sullivan, Bartholomew & Jessica Estepa, *Take a Peek at Protests at Town Halls Around the Country*, USA Today (Feb. 22, 2017) 17

United States, Brief for the United States as Amicus Curiae Supporting Petitioners, *Reichle v. Howards*, 566 U.S. 658 (2012) (No. 11-262) 20

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fane Lozman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, Pet. App. 1a, is unreported but is available at 2017 WL 765771. The order of the United States District Court for the Southern District of Florida denying respondent's motion for summary judgment, Pet. App. 15a, is reported at 39 F. Supp. 3d 1392 (S.D. Fla. 2014).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 28, 2017. Pet. App. 1a. On May 15, 2017, Justice Thomas extended the time to file this petition for a writ of certiorari to and including June 28, 2017. *See* No. 16A1100. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the government for a redress of grievances."

42 U.S.C. § 1983 provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

INTRODUCTION

Petitioner Fane Lozman is an outspoken critic of certain eminent domain redevelopment efforts proposed by respondent, the City of Riviera Beach, Florida. Among other things, petitioner filed a lawsuit alleging that the City had violated Florida's Government in the Sunshine Act. Shortly thereafter, respondent's City Council, in a closed-door session, reached a "consensus" to send a "message" that would "intimidate" petitioner. Pet. App. 17a-18a. When petitioner began to speak during the public comment period at a subsequent City Council meeting, the presiding councilmember ordered his arrest. After the state's attorney declined to prosecute, petitioner brought suit under 42 U.S.C. § 1983. He sought damages on the ground that the City had violated his First Amendment rights when it retaliated against him for having filed the lawsuit and having publicly criticized the government.

The Eleventh Circuit acknowledged that at trial petitioner had "established a sufficient causal nexus" between his arrest and the retaliatory animus of the City Council. Pet. App. 10a. Nonetheless, it held that petitioner could not recover because the jury's finding that police had probable cause to arrest petitioner for disturbing a lawful assembly—a crime with which he was never charged—defeated his "First Amendment retaliatory arrest claim as a matter of law." *Id.* 11a. This holding further entrenched a longstanding circuit conflict over the legal significance of probable cause in cases alleging retaliatory arrest.

STATEMENT OF THE CASE

1. *Factual background.* This case arises from a dispute over city policy between petitioner and the City of Riviera Beach that resulted in petitioner's arrest in November of 2006. Earlier that year, petitioner, a former United States Marine Corps officer and financial trader, had moved to the City with his floating home and leased a slip in the municipally-owned marina. Pet. App. 16a. Shortly thereafter, petitioner learned that the City planned to redevelop its waterfront area by, among other things, seizing "thousands of homes through the power of eminent domain" and then transferring that property "to a private developer." *Id.* He became an outspoken critic of the plan. *Id.*

Before the City could finalize its agreement with the private developers, the Florida Legislature passed a bill prohibiting the use of eminent domain for private development. Pet. App. 2a. But the day before the Governor was scheduled to sign that bill into law, the City

Council convened an "eleventh-hour" meeting to approve its agreement with the developers. *Id.* 3a.

In response, petitioner filed a lawsuit alleging that the agreement was invalid because the City had violated the Florida Government in the Sunshine Law, Fla. Stat. § 286.011, which requires that the government provide reasonable public notice of a meeting at which official actions will be taken. Pet. App. 2a-3a. After petitioner filed his lawsuit, members of the City Council came under investigation by the Florida Department of Law Enforcement. *Id.* 3a.

Shortly thereafter, the City Council held a closed-door meeting to discuss petitioner's lawsuit. Members expressed their anger at petitioner, and Councilmember Elizabeth Wade proposed that the City "intimidate" him. Pet. App. 3a. The Council Chairperson then asked whether the Council had a "consensus" to send petitioner a "message"; the other councilmembers, along with the City Attorney, agreed. *Id.* 18a.[1]

The City soon undertook a series of actions against petitioner. One example with which this Court is already familiar involved attempting to evict him from the municipal marina. *See Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013). The City brought eviction proceedings in state court, but a jury returned a verdict in petitioner's favor, "finding that Lozman's protected speech was a substantial or motivating factor in the City's decision to terminate his lease."

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[1] Florida's Sunshine Law allows city councils to hold closed-door meetings to discuss pending litigation. Fla. Stat. § 286.011(8). These meetings, however, must be transcribed and the transcripts made public once the litigation concludes. *Id.* § 286.011(8)(c), (e).

Lozman v. City of Riviera Beach, 713 F.3d 1066, 1070 (11th Cir. 2013). Undeterred by these "unsuccessful efforts," *Lozman*, 133 S. Ct. at 739, the City turned to federal admiralty law to seize, and ultimately destroy, petitioner's floating home, *id.* at 740. But this Court held that admiralty law did not allow the seizure because petitioner's floating home was not a "vessel." *Id.*

2. *Petitioner's arrest.* This petition springs from yet another action the City took against petitioner. During a City Council meeting in November 2006, petitioner was given permission to address the Council during the non-agenda public comment period. Pet. App. 3a.[2] The events that followed were, as the court of appeals noted, captured on video. *See id.*; *Activist Arrested at Riviera Beach City Council Meeting*, YouTube (Sept. 15, 2009), https://tinyurl.com/lbj5qqj (at 0:30).

Upon reaching the lectern, petitioner began to speak about local government corruption in Palm Beach County. After a few seconds, Councilmember Wade, who was presiding, attempted to cut him off. Pet. App. 4a. When petitioner continued his remarks, she summoned Riviera Beach Police Officer Francisco Aguirre. Petitioner told Officer Aguirre that he was not finished speaking. Presiding Councilmember Wade then ordered Officer Aguirre to "carry him out." *Id.* Officer Aguirre arrested petitioner, handcuffed him, and removed him from the meeting. *Id.*

Petitioner was taken to the police station and placed in a holding cell. When he was released, he was

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[2] This is the segment of each Council meeting during which members of the public can speak about matters not on the meeting's agenda. Pet. App. 3a n.2.

given a notice to appear that listed two charges: "disorderly conduct" and "resisting arrest without violence." Pet. App. 4a; *see* Fla. Stat. § 877.03 (disorderly conduct); Fla. Stat. § 843.02 (resisting arrest without violence).

The state's attorney, however, soon dismissed both charges on the basis that there was "no reasonable likelihood of successful prosecution." Pet. App. 4a-5a.

3. *District court proceedings.* Petitioner filed this Section 1983 lawsuit in the United States District Court for the Southern District of Florida. As is relevant here, he alleged that the City directed his arrest in retaliation for his having petitioned the government and having spoken freely on public issues, thereby depriving him of rights secured by the First Amendment. Pet. App. 29a.[3]

To prevail on his First Amendment retaliation claim, petitioner was required to prove three elements. *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005). First, he had to show that he had engaged in protected First Amendment conduct. Second, he had

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[3] Petitioner brought several other claims under the First, Fourth, and Fourteenth Amendments, as well as under state law. Pet. App. 22a-23a. Those claims, which have been finally resolved, are not at issue in this petition.

Initially, the district court dismissed petitioner's claims on *Rooker–Feldman* grounds in light of the state-court eviction proceeding, at which he had successfully raised a First Amendment retaliation defense. *Lozman*, 713 F.3d at 1071. The Eleventh Circuit reversed and held that petitioner was entitled to proceed in federal court on his claims. *Id.* at 1074.

On remand, petitioner voluntarily dismissed his claims against all defendants other than respondent. Pet. App. 23a.

to show that the City's action would have chilled a person of ordinary firmness. Third, he had to show that his protected First Amendment activity was a motivating factor in the City's action.

But because petitioner was challenging an arrest, Eleventh Circuit precedent required that he prove a fourth factor as well: that there was no probable cause for that arrest. *See Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002). The district court enforced this requirement, though it recognized a "conflict between the circuits" on this point. Order at 2, *Lozman v. City of Riviera Beach*, No. 08-80134-CIV (S.D. Fla. Nov. 4, 2014), ECF 666 (comparing *Dahl* to *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006)).

The district court denied the City's motion for summary judgment on petitioner's retaliatory-arrest claim. Pet. App. 36a. There was no genuine dispute as to whether petitioner was engaged in protected First Amendment activity: "the record plainly show[ed]" that he "was engaged in expressive political speech, as well as the valid exercise of his right to petition the government," in the months preceding his arrest. *Id.* 32a. Nor was there any dispute that an arrest would chill a person of ordinary firmness.

But the district court determined that there were two disputed issues that required a trial. As to the question of a retaliatory motive, the court pointed to evidence in the record of "a very close temporal connection between the timing of Plaintiff's expressive speech and the filing of the Sunshine Act suit, and the City's exertion of an extended string of legal pressures against Lozman." Pet. App. 30a. This connection was probative of "improper motive behind the City's actions." *Id.* In addition, the court identified "a genuine

issue of material fact on the question of whether City of Riviera Beach police officers had probable cause to arrest Plaintiff for disorderly conduct or resisting arrest without violence." *Id.*

The case proceeded to trial. Midway through that trial, the district court expressed doubt that there had been probable cause to arrest petitioner for either disorderly conduct or resisting arrest. Tr. 81-84, 89-94 (11/26/2014). Referring to the question whether there was *any* justification for petitioner's arrest, the court asked the City, "What else do you have?" *Id.* at 94. The City offered up a different provision, Florida Statute Section 871.01(1), as "perhaps the most on point" statute. Tr. 94 (11/26/2014). That provision makes it a misdemeanor when an individual "willfully interrupts or disturbs any school or any assembly of people met for the worship of God or for any lawful purpose." Fla. Stat. § 871.01(1). Two days later, the district court proposed that it "put this statute in front of the jury" and "eliminate" any reference in the jury instructions to the original charges. Tr. 248 (12/2/2014).[4]

At the close of evidence, the district court instructed the jury that, as a matter of law, petitioner's Sunshine Law suit and his public criticism of the City in the months leading up to his arrest were protected First Amendment activity. Pet. App. 60a. But rather than direct the jury to determine whether members of the City Council had a retaliatory motive, the district court instead instructed the jury to consider whether

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[4] References to the transcript of the 2014 trial are indicated with "Tr. XX (YY)," where XX provides the page number, and YY refers to the date.

petitioner had proved that *Officer Aguirre* had a culpable state of mind. *Id.* 59a-60a. And finally, in keeping with the Eleventh Circuit's long-established rule for retaliatory-arrest claims, the district court instructed the jury that it should return a verdict for the City unless petitioner had proved that there was no probable cause to arrest him—in particular, for violating Section 871.01(1). *Id.* 60a.

The jury returned a verdict for the City. Pet. App. 2a.

4. *Eleventh Circuit appeal.* The Eleventh Circuit affirmed. It upheld the jury's finding that "Officer Aguirre reasonably believed Lozman was committing, or was about to commit, the offense of Disturbing a Lawful Assembly." Pet. App. 9a. And it reiterated its longstanding rule that probable cause "'constitutes an absolute bar' to a claim for false arrest," even when "the false arrest claim is brought under the First Amendment" as a retaliation claim. *Id.* 7a (quoting *Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998) and citing *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002)). The fact that "the arrest was supported by probable cause defeat[ed] Lozman's First Amendment retaliatory arrest claim as a matter of law." *Id.* 11a. Consequently, although petitioner had made a "compelling" argument that the district court had erred in its jury instructions regarding the City's retaliatory motive, the Eleventh Circuit determined that any error was "harmless." *Id.* 10a-11a.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's decision here implicates a deep and mature circuit split over whether the presence of probable cause categorically defeats a First

Amendment retaliatory-arrest claim. The split intensified following this Court's decisions in *Hartman v. Moore*, 547 U.S. 250 (2006), and *Reichle v. Howards*, 566 U.S. 658 (2012). In *Hartman*, this Court held that a plaintiff alleging retaliatory *prosecution* in violation of the First Amendment must plead and prove that the charges were not supported by probable cause. 547 U.S. at 265-66. The Court subsequently granted certiorari in *Reichle* to decide "whether the reasoning in *Hartman*" should apply to retaliatory *arrests* as well. *See* 566 U.S. at 670. But the Court reserved that question after deciding that the individual defendants in that case were entitled to qualified immunity. *Id.* at 663. Since *Reichle*, the question has evaded uniform resolution. Only this Court can resolve the conflict, and this case presents an ideal opportunity to do so.

This Court should hold that probable cause for an arrest does not defeat a First Amendment retaliatory-arrest claim as a matter of law. Instead, retaliatory arrest cases should follow the standard framework for First Amendment retaliation cases laid out in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Under that framework, the presence of probable cause for an arrest can be relevant evidence, but it will not categorically foreclose retaliatory-arrest claims. This rule already governs arrests challenged under the Equal Protection Clause, and it should be the rule that governs First Amendment challenges as well.

I. Courts are intractably divided over the question this Court reserved in *Reichle*.

Courts and commentators consistently recognize that the "circuits are split" over whether the presence

of probable cause categorically defeats a civil suit for retaliatory arrest. *Thayer v. Chiczewski*, 705 F.3d 237, 253 (7th Cir. 2012); *see also* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments*, 29 Touro L. Rev. 633, 647 (2013). That circuit split has only deepened in the five years since *Reichle v. Howards*, 566 U.S. 658 (2012). In addition to the manifest circuit split, there is now in other circuits "widespread instability in the law on the precise question of probable-cause arrests." *Dukore v. District of Columbia*, 799 F.3d 1137, 1145 (D.C. Cir. 2015). While eleven circuits have encountered the question left open by *Reichle*, no consensus has emerged.

1. In two circuits, a plaintiff can prevail in a First Amendment retaliatory-arrest claim even if probable cause existed for the underlying arrest.

In the Ninth Circuit, an arrest "motivated by retaliatory animus" is unlawful, "even if probable cause existed for that action." *Ford v. City of Yakima*, 706 F.3d 1188, 1196 (9th Cir. 2013). Thus, "a plaintiff need not plead the absence of probable cause in order to state a claim for retaliation." *Skoog v. County of Clackamas*, 469 F.3d 1221, 1232 (9th Cir. 2006); *see also Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990).

In *Howards v. McLaughlin*, 634 F.3d 1131 (10th Cir. 2011), the Tenth Circuit addressed the "uncertainty" that *Hartman* had injected into claims of retaliatory arrest. *Wilson v. Village of Los Lunas*, 572 Fed. Appx. 635, 643 (10th Cir. 2014). It held that "*Hartman* did not disturb [its] earlier precedent" and thus "an arrest made in retaliation of an individual's First Amendment rights is unlawful, even if the arrest is

supported by probable cause." *Howards*, 634 F.3d at 1148 (citing *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990)). This Court granted review, but "elect[ed]" not to address the Tenth Circuit's rule regarding probable cause and retaliatory-arrest claims. *Reichle*, 566 U.S. at 663. Instead, it "reverse[d] the judgment of the Court of Appeals denying petitioners qualified immunity." *Id.* Since *Reichle*, the Tenth Circuit has not revisited its holding in *Howards*. *See Wilson*, 572 Fed. Appx. at 643.

2. Conversely, four other circuits are aligned with the Eleventh Circuit in holding that "the existence of probable cause to arrest" bars a First Amendment retaliation claim. *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002).

In the Second Circuit, when "probable cause to arrest exist[s] independent of the defendants' motive," a plaintiff's retaliatory-arrest claim fails as a matter of law. *Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992); *see also Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001). Indeed, that court has stated not only that a plaintiff cannot recover for such an arrest, but that the presence of probable cause means that "[n]o First Amendment violation therefore occurred." *Lebowitz v. City of New York*, 606 Fed. Appx. 17, 17-18 (2d Cir. 2015) (summary order).

This year, the Fourth Circuit deepened the circuit split. In *Pegg v. Herrnberger*, 845 F.3d 112 (4th Cir. 2017), it held that because the defendant had probable

cause to arrest the plaintiff, "his arrest was not retaliatory." *Id.* at 119.[5]

The Fifth Circuit also bars retaliatory-arrest suits in cases where there is probable cause to arrest. In *Keenan v. Tejeda*, 290 F.3d 252 (5th Cir. 2002), it declared that the "objectives of law enforcement take primacy over the citizen's right to avoid retaliation" in a situation where "law enforcement officers might have a motive to retaliate," but there is also probable cause. *Id.* at 261-62. In such cases, "any argument that the arrestee's speech" motivated the arrest "must fail, no matter how clearly that speech may be protected by the First Amendment." *Mesa v. Prejean*, 543 F.3d 264, 273 (5th Cir. 2008); *see also Allen v. Cisneros*, 815 F.3d 239, 244-45 (5th Cir. 2016).

Finally, the Eighth Circuit has held that "[l]ack of probable cause is a necessary element" of a First Amendment retaliatory-arrest claim. *McCabe v. Parker*, 608 F.3d 1068, 1075 (8th Cir. 2010); *see Williams v. City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007). The Eighth Circuit reaffirmed this rule after *Reichle*. *Galarnyk v. Fraser*, 687 F.3d 1070, 1076 (8th Cir. 2012).

3. In the years since *Hartman* and *Reichle*, four other circuits have confronted the question whether the presence of probable cause defeats a retaliatory-arrest claim as a matter of law. Each failed to adopt a clear rule.

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[5] The Fourth Circuit based its holding on the assumption that *Reichle* was "fully controlling" of the question. *Pegg*, 845 F.3d at 119. *But see Reichle*, 566 U.S. at 668 ("To be sure, we do not suggest that *Hartman*'s rule in fact extends to arrests.").

In *Dukore v. District of Columbia*, 799 F.3d 1137 (D.C. Cir. 2015), the D.C. Circuit noted the "widespread instability in the law on the precise question of probable-cause arrests." *Id.* at 1145. It referred to its earlier opinion in *Moore v. Hartman*, 644 F.3d 415 (D.C. Cir. 2011), which had pointed out "that the federal courts of appeals were split" on the question and in which the D.C. Circuit itself had "expressly declined to take sides." *Dukore*, 799 F.3d at 1145. The *Dukore* court then disposed of the case before it on qualified immunity grounds rather than announce a clear, prospective rule. *Id.*[6]

The Third Circuit has been disposing of retaliatory-arrest cases through nonprecedential opinions that have sent contradictory signals to parties and district courts. In *Primrose v. Mellott*, 541 Fed. Appx. 177 (3d Cir. 2013), a panel stated that the Circuit had "not decided whether the logic of *Hartman* applies to retaliatory arrest claims." *Id.* at 180 n.2. But a year later, in *Credico v. West Goshen Police*, 574 Fed. Appx. 126

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[6] The course of the proceedings in *Moore* illustrates this instability and confusion. After this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), reversed an earlier D.C. Circuit decision, the case was remanded for further proceedings. The D.C. Circuit's ensuing 2011 opinion recognized the circuit split on the question presented by petitioner here, but declared it had "no occasion to address First Amendment retaliatory *arrest* requirements." *Moore v. Hartman*, 644 F.3d 415, 423 n.8 (D.C. Cir. 2011) (emphasis in original). That decision was in turn vacated and remanded by this Court "for further consideration in light of *Reichle*." *Hartman v. Moore*, 132 S. Ct. 2740, 2740 (2012). The D.C. Circuit then decided that "nothing in *Reichle* changes [its] conclusion." *Moore v. Hartman*, 704 F.3d 1003, 1004 (D.C. Cir. 2013) (internal quotation marks omitted).

(3d Cir. 2014), a different panel read *Hartman* to bar retaliatory-arrest claims when "there was probable cause." *Id.* at 128. This has left district courts within the Third Circuit in disarray: some acknowledge the circuit's uncertainty and decide cases on qualified immunity grounds, while others have treated lack of probable cause as an essential element of the plaintiff's claim.[7]

While the Sixth Circuit has read *Hartman* to defeat a First Amendment retaliatory-arrest claim when the arrest is made pursuant to an indictment, *see Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006), it has "defer[red] resolution" of the question whether *Hartman* extends to a claim alleging a retaliatory arrest "prior to any prosecutorial or grand jury involvement." *Kennedy v. City of Villa Hills*, 635 F.3d 210,

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[7] For courts that have treated the law as not clearly established, see, e.g., *Corliss v. Lynott*, No. 3:15-CV-01364, 2016 WL 625071, at *10 (M.D. Pa. Jan. 5, 2016), *aff'd*, No. 16-1597, 2017 WL 57772 (3d Cir. Jan. 5, 2017); *Safa v. City of Philadelphia*, No. 2:13-cv-5007-DS, 2015 WL 3444264, at *11 (E.D. Pa. May 29, 2015); and *Price v. City of Philadelphia*, No. 15-1909, 2017 WL 895586, at *7 (E.D. Pa. Mar. 7, 2017), which stated that "*Hartman* does not itself bar Plaintiff's claim" and that it is "unclear whether *Hartman* applies to retaliatory arrests in this Circuit." For an example of a court that has treated lack of probable cause as an "essential element" of a plaintiff's claim, see *Barnes v. Edwards*, No. 13-4239, 2016 WL 3457158, at *6 (D.N.J. June 24, 2016).

In the context of disciplinary proceedings, the Third Circuit has held that "a plaintiff can make out a retaliation claim even though the charge against him may have been factually supported." *Watson v. Rozum*, 834 F.3d 417, 426 (3d Cir. 2016) (prisoners), *cert. denied sub nom. Coutts v. Watson*, 2017 WL 915335 (June 26, 2017); *Hill v. City of Scranton*, 411 F.3d 118, 130-32 (3d Cir. 2005) (municipal employees).

217-18 n.4 (6th Cir. 2011). The Sixth Circuit still has "not resolved whether lack of probable cause is an element" of such retaliatory-arrest claims. *Wesley v. Campbell*, 779 F.3d 421, 435 (6th Cir. 2015) (internal quotation marks omitted); *see also Marshall v. City of Farmington Hills*, 2017 WL 2380650, at *7 (6th Cir. 2017) (resolving claim on qualified-immunity grounds).

Finally, in *Thayer v. Chiczewski*, 705 F.3d 237 (7th Cir. 2012), the Seventh Circuit observed that "circuits are split" on "whether probable cause is a complete bar to First Amendment retaliatory arrest claims." *Id.* at 253 (emphasis omitted). Rather than aligning itself with one side or the other, and even though the "defendants didn't argue qualified immunity on appeal," the court sua sponte resolved the case on the grounds of qualified immunity. *Id.* at 252-53.

II. The question presented is important.

The disarray among the circuits has persisted in significant part because of how those courts have read *Hartman v. Moore*, 547 U.S. 250 (2006), and *Reichle v. Howards*, 566 U.S. 658 (2012). Without this Court's guidance, this important issue will not be resolved.

1. The problem of retaliatory arrests is not new. History is replete with examples of government officials pretextually enforcing minor laws against individuals who have exercised core First Amendment rights. In 1956, for example, police officers in Montgomery, Alabama, arrested and jailed Dr. Martin Luther King, Jr., for driving thirty miles per hour in a twenty-five mile-per-hour zone. *See* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of*

the Montgomery Bus Boycott, 98 Yale L.J. 999, 1028 (1989).

Recent years have seen a fresh surge of civic engagement, much of it involving criticism of the government. *See, e.g.*, Bartholomew Sullivan & Jessica Estepa, *Take a Peek at Protests at Town Halls Around the Country*, USA Today (Feb. 22, 2017), https://tinyurl.com/m9k67uy; Conor Friedersdorf, *The Significance of Millions in the Street*, Atlantic (Jan. 23, 2017), https://tinyurl.com/l5m38zz; Liz Robbins, *Tax Day Is Met with Tea Parties*, N.Y. Times (Apr. 15, 2009), https://tinyurl.com/coh9tq.

Thus, the risk of retaliatory arrests remains a pressing concern, as a recent report by the U.S. Department of Justice shows. *See* U.S. Dep't of Justice, Civil Rights Div., *Investigation of the Baltimore City Police Department* 116-21 (Aug. 10, 2016), https://tinyurl.com/kzm8las ("In sum, BPD takes law enforcement action in retaliation for individuals' engaging in protected speech or activity in violation of the First Amendment."); Mark Berman, *ACLU, Other Groups Sue Baton Rouge Police and Accuse Them of Violating Protesters' Rights*, Wash. Post (July 13, 2016), https://tinyurl.com/kcdbvfp.

2. The "widespread instability in the law on the precise question of probable-cause arrests," *Dukore v. District of Columbia*, 799 F.3d 1137, 1145 (D.C. Cir. 2015), leaves municipalities in an untenable position. Current law is unclear as to whether and when an officer can consider a target's speech or conduct in deciding whether to make an arrest. But jurisdictions need guidance as to how to train police officers on the proper relationship between probable cause and respect for

individuals' First Amendment rights. Police Exec. Research Forum, *Police Management of Mass Demonstrations* 73 (2006) (describing the need to "balance a number of conflicting demands," including respect for First Amendment rights). The availability of qualified immunity for individual defendants is no answer to this uncertainty since jurisdictions may still face liability for arrests directed by policymakers. *See Pembauer* v. *City of Cincinnati*, 475 U.S. 469, 484 (1986) (county prosecutor directing sheriffs to "go in and get [them]"); Pet. App. 4a (presiding councilmember directing officer to "carry him out").

3. This Court has long emphasized that, "[u]nder a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community." *Miller* v. *California*, 413 U.S. 15, 30 (1973). Not so under existing circuit precedent. An individual arrested in Selma, Alabama, because he exercised his First Amendment rights cannot prevail on a Section 1983 claim if there was probable cause to arrest him for a minor infraction. *See supra* at 12 (law in the Eleventh Circuit). But an individual arrested for the same reasons in Selma, California, can. *See supra* at 11 (law in the Ninth Circuit). An individual's ability to vindicate his rights should not be left to geographic accident.

III. Petitioner's case presents an ideal vehicle for resolving this conflict.

1. This case presents an especially clean opportunity for the Court to answer this long-simmering and important question.

First, the defendant in this case is a municipality. In *Owen* v. *City of Independence*, 445 U.S. 622 (1980),

this Court held that municipalities cannot assert qualified immunity. *Id.* at 657. Thus, there is no possibility that if this Court grants certiorari it will end up resolving the case on qualified immunity grounds. By contrast, many retaliatory-arrest cases are brought against individual government officials, often line-level police officers. Because defendants in those cases will usually seek, and frequently be entitled to, qualified immunity, many courts decline to resolve the question whether probable cause defeats a damages claim arising from a retaliatory arrest. That in fact is what happened before this Court in *Reichle v. Howards*, 566 U.S. 658, 663 (2012).[8]

Second, in this case, petitioner's Sunshine Law suit and his criticism of the City's policies in the months leading up to his arrest were entirely protected by the First Amendment. Pet. App. 60a. Litigation and criticism of the government are core First Amendment activities. *See Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *see also NAACP v. Button*, 371 U.S. 415, 439-41 (1963).

By contrast, in other retaliatory-arrest cases, there is sometimes disagreement over whether the plaintiff's conduct is protected activity or an element of the crime for which he was arrested. For example, in *Reichle*, this Court cited *Wayte v. United States*, 470 U.S. 598 (1985), as a case where the petitioner claimed that his speech—letters he sent to the Selective Service expressing disagreement with the draft—

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[8] Moreover, because this case arises under Section 1983, the Court need not decide the logically antecedent question presented in *Reichle*: whether *Bivens* "extends to violations of the First Amendment." 566 U.S. at 663 n.4.

was protected by the First Amendment, but the Court determined that it constituted evidence of "one of the elements of the offense" with which he had been charged. *Id.* at 612-13; *see Reichle*, 566 U.S. at 668. In those sorts of cases, this Court may be unable to resolve the question presented without first deciding whether the plaintiff engaged in protected First Amendment activity at all. In *Reichle*, the Government made an argument along these lines. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 25-27, *Reichle*, 566 U.S. 658 (No. 11-262).

Third, as it comes to this Court, the existence of probable cause is settled. A jury found that petitioner's arrest was supported by probable cause; the Eleventh Circuit affirmed that finding, Pet. App. 8a-9a; and petitioner does not challenge that determination here. Thus, the only remaining issue is whether the presence of probable cause defeats petitioner's First Amendment retaliatory-arrest claim as a matter of law. By contrast, in cases that come to this Court on motions to dismiss or for summary judgment, the existence of probable cause is often still contested. In such cases, this Court's ability to answer the question presented could be derailed by a conclusion that probable cause did not in fact exist. That was what prevented the Sixth Circuit from answering the same question presented in *Leonard v. Robinson*, 477 F.3d 347, 356 (6th Cir. 2007).

2. This Court's decision on the question presented will be outcome determinative here.

The Eleventh Circuit recognized that petitioner had made a "compelling" argument that the jury was not properly instructed on his "theory of animus and causation," and that the district court thereby "erred

by instructing the jury" to focus on Officer Aguirre rather than the City's policymakers. Pet. App. 10a. Nonetheless, the court of appeals affirmed the judgment on the basis of its rule that "probable cause defeat[ed] Lozman's First Amendment retaliatory-arrest claim as a matter of law." *Id.* 11a. That rule rendered any error "harmless." *Id.* 10a-11a.

Because this harmless-error determination turns entirely on the Eleventh Circuit's probable-cause rule, it cannot survive a decision by this Court rejecting that rule. Therefore, if this Court holds that probable cause does not bar a First Amendment retaliatory-arrest claim as a matter of law, petitioner will be entitled to a new trial.

IV. The existence of probable cause for an arrest should not defeat a First Amendment retaliation claim as a matter of law.

A plaintiff claiming retaliation for protected First Amendment activities ordinarily must plead and prove three elements: first, that he was engaged in constitutionally protected activity; second, that he was subjected to a meaningfully adverse official action; and third, that his protected activity was a "motivating factor" behind that action, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270-71 & n.21 (1977)).

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court added an additional element to that framework in cases alleging retaliatory prosecution. It held that, in such cases, the absence of probable cause "must be pleaded and proven" as "an element of a plaintiff's case." *Id.* at 266.

But none of the justifications underlying this Court's decision in *Hartman* warrant extending its rule to retaliatory-arrest claims. To the contrary, the standard framework is both workable and more consistent with the First Amendment values at stake. And since probable cause has never barred challenges to racially discriminatory arrests, it should not bar First Amendment retaliatory-arrest claims either.

A. The *Mt. Healthy* burden-shifting framework draws the right distinction between legitimately motivated government actions and retaliatory ones.

1. "[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in constitutionally protected activity. *Hartman*, 547 U.S. at 256. Thus, when a plaintiff shows that the government acted against him "out of a desire to prevent" him from engaging in protected First Amendment activity, he "is entitled to challenge that unlawful action under the First Amendment." *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016).

But this Court has also recognized that government conduct is not always "motivated solely by a single concern." *Arlington Heights*, 429 U.S. at 265. Accordingly, the Court has held that "even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." *Texas v. Lesage*, 528 U.S. 18, 20-21 (1999).

The standard framework for implementing this principle was enunciated in *Mt. Healthy* and *Arlington Heights*.[9] Once a plaintiff has made out a case of unconstitutional retaliation, the burden of proof shifts to the defendant to rebut causation. The defendant must show that it would have taken the same action "even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287. In other words, the fact that the defendant articulates a legitimate basis that *could* have motivated its action is not enough; rather, it must show that that legitimate basis actually *did* motivate its action.

The virtue of this burden-shifting framework has long been recognized. *See Mt. Healthy*, 429 U.S. at 287. It holds public officials and municipalities liable unless they rebut the plaintiff's showing of a causal connection between his injury and their impermissible motive, thereby recognizing that "[o]fficial reprisal for protected speech 'offends the Constitution.'" *Hartman*, 547 U.S. at 256 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998)). But it also recognizes that "there is no cognizable injury warranting relief under § 1983" when "the government would have made the same decision" in any event. *Lesage*, 528 U.S. at 21.

2. The *Mt. Healthy* framework is well-suited to retaliatory-arrest claims. Courts that treat retaliation claims involving arrests the same as other retaliation claims have tools for resolving cases accurately and efficiently.

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[9] Although *Mt. Healthy* involved a First Amendment claim, and *Arlington Heights* involved an Equal Protection claim, this Court has treated that distinction as "immaterial." *Lesage*, 528 U.S. at 21.

As an initial matter, pleading rules enable district courts to weed out meritless claims quickly at minimal cost. The *Mt. Healthy* framework requires that the plaintiff show that an impermissible purpose was "a motivating factor" in the challenged government decision. *Arlington Heights*, 429 U.S. at 266. As this Court made clear in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), plaintiffs who allege that a government action is unconstitutional because of the motive behind it must do more to meet their burden at the pleading stage than advance "naked assertion[s] devoid of further factual enhancement." *Id.* at 678 (internal quotation marks omitted). Thus, only plaintiffs whose complaints "contain sufficient factual matter" to show a "plausible" entitlement to relief can survive a motion to dismiss. *Id.*

Moreover, even past the pleading stage, "the existing procedures available to federal trial judges in handling claims that involve examination of an official's state of mind" offer "many options for the district judge." *Crawford-El*, 523 U.S. at 597, 599. These options enable them to limit or otherwise "manage the discovery process to facilitate prompt and efficient resolution of the lawsuit." *Id.* at 599. And summary judgment enables them to "weed out truly insubstantial lawsuits prior to trial." *Id.* at 600.

The experience in the lower courts shows that district courts can use these techniques to handle retaliatory-arrest suits without imposing a rule that probable cause categorically defeats these claims. For example, district courts within the Ninth Circuit have adjudicated these claims for over a decade without resorting to such a rule. *See, e.g.*, *James v. City & County of Honolulu*, 125 F. Supp. 3d 1080, 1097-98 (D. Haw. 2015); *White v. City of Laguna Beach*, 679 F.

Supp. 2d 1143, 1149-50 (C.D. Cal. 2010); *El v. Crain*, 560 F. Supp. 2d 932, 949-50 (C.D. Cal. 2008); *see also Gullick v. Ott*, 517 F. Supp. 2d 1063, 1072-73 (W.D. Wis. 2007); *Stone v. Juarez*, No. CIV 05-508, 2006 WL 1305039, at *8, *13-14 (D.N.M. Apr. 23, 2006).

Thus, the standard framework is entirely capable of handling retaliatory-arrest claims.

B. None of the reasons for *Hartman*'s exception to the standard framework applies in the case of retaliatory arrests.

Under *Mt. Healthy*'s rule, the responsibility for showing probable cause in retaliatory-arrest cases will lie with the defendant, who can use the presence of probable cause either to argue that he had no retaliatory motive or to show that, though he had such a motive, he would have arrested the plaintiff in any event. Thus, the mere existence of probable cause, though potentially probative, is not dispositive.

For reasons "specific to retaliatory-prosecution cases," this Court in *Hartman* carved out an exception to the rule governing "ordinary retaliation claims." 547 U.S. at 259. Under *Hartman*'s rule, a plaintiff who brings a First Amendment claim of retaliatory prosecution must not only plead and prove that an impermissible retaliatory purpose was a motivating factor in his prosecution, but must also affirmatively plead and prove the absence of probable cause. *Id.* at 265-66.

None of the reasons this Court gave in *Hartman* for departing from the *Mt. Healthy* burden-shifting framework in retaliatory-prosecution cases applies to claims of retaliatory arrest.

1. In *Hartman*, this Court said the "strongest justification for the no-probable-cause requirement" was

the complex causal connection inherent in retaliatory-prosecution claims. *Hartman*, 547 U.S. at 259. A prosecutor generally makes the decision about whether to prosecute after exercising "independent judgment." *Id.* at 263 (quoting *Smiddy v. Varney*, 665 F.2d 261, 267 (9th Cir. 1981)). And a prosecutor is absolutely immune from liability for making that decision. *See Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). Thus, the defendant in a retaliatory-prosecution case will never be the prosecutor who directly inflicted the plaintiff's injury. Instead, the defendant will be some person further back in the causal chain who, at most, influenced the prosecutor's decision to file charges. Proof of the absence of probable cause, the Court suggested, can help to "bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action." *Hartman*, 547 U.S. at 251.

By contrast, "there is no gap to bridge" in retaliatory-arrest cases. *Reichle v. Howards*, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring). Indeed, the causal chain in a retaliatory-arrest case is no more complex than it is in other retaliation cases—the kinds of cases that are indisputably governed by the *Mt. Healthy* framework. Neither a line-level officer who makes an arrest, nor an official who orders one, is entitled to absolute immunity. *See Pierson v. Ray*, 386 U.S. 547, 555 (1967) (police officers); *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974) (high-level officials). So the defendant in a retaliatory-arrest case is the actor who inflicted the injury. And of course, in a case where a plaintiff alleges that his retaliatory arrest was the product of a municipal policy—as petitioner did here, *see* Pet. App. 10a—there is no question

of immunity at all. Because the plaintiff in a retaliatory-arrest claim can directly sue the actor who caused his injury, there is no "problem of causation," *Hartman*, 547 U.S. at 263.[10]

2. In *Hartman*, this Court also cited the "presumption of regularity accorded to prosecutorial decisionmaking" as a reason for imposing an additional burden on plaintiffs claiming retaliatory prosecution. *Hartman*, 547 U.S. at 263.

This Court has already declared that this presumption "does not apply" in the context of retaliatory arrests. *Reichle*, 566 U.S. at 669. The presumption therefore provides no basis for extending the *Hartman* rule to retaliatory-arrest cases.

3. In *Hartman*, this Court stated that requiring a plaintiff to plead and prove a lack of probable cause in a retaliatory-prosecution case would impose "little or no added cost" on the plaintiff. *Hartman*, 547 U.S. at 265-66. It offered two bases for that conclusion. The first is that the existence of probable cause is likely to be at issue in every retaliatory-prosecution case. The second is that putting the burden on the plaintiff to

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[10] Moreover, when it comes to checking prosecutorial retaliation, there are mechanisms other than Section 1983 damages lawsuits. First, criminal defendants can raise a defense of selective prosecution, even if there is probable cause to charge the underlying crime. *See Wayte v. United States*, 470 U.S. 598, 607-08 (1985). Second, prosecutors who are found to have acted with impermissible motives face both judicial reprimand and bar discipline. *See, e.g., Connick v. Thompson*, 563 U.S. 51, 65-66 (2011). Neither of these avenues is available with respect to retaliatory arrests.

plead and prove its absence is not unduly onerous. Neither of those bases justifies extending that requirement to retaliatory-arrest cases.

It is true enough that probable cause can be an issue in retaliatory-arrest cases, as petitioner has already explained. *See supra* at 25. But that should not, standing alone, determine who should bear the responsibility for pleading the issue of probable cause, proving its existence, or persuading the factfinder as to whether the arrest would have occurred in the absence of a retaliatory motive. Differences between arrests and prosecutions cut strongly against placing any of these burdens on the plaintiff.

In a retaliatory-prosecution case, the plaintiff will by definition have a charging instrument that cabins the scope of the probable-cause inquiry, and thus any burdens of pleading or proof, by identifying a specific crime. That will not be the case in lawsuits claiming retaliatory arrest. An arresting officer is not required to state the crime for which he made the arrest. *See Devenpeck v. Alford*, 543 U.S. 146, 155 (2004). Thus, when, as often happens, a plaintiff was arrested but was never formally charged, it may be unclear for which crimes he should be expected to plead, and later prove, the absence of probable cause.

This problem is particularly acute because contemporary federal, state, and municipal codes criminalize a wide range of behavior that Americans regularly engage in. *See* David A. Harris, *"Driving While Black" and All Other Traffic Offenses*, 87 J. Crim. L. & Criminology 544, 557-58 (1997); *see also* Harvey A. Silvergate, *Three Felonies a Day* (2009). If this Court were to extend *Hartman* to arrests, a plaintiff would

have to plead sufficient facts to show that no reasonable officer could have had probable cause to believe the plaintiff violated any one of these statutes. *See Ashcroft v. Iqbal*, 556 U.S. at 680-81. This burden is unwarranted.

Even if a plaintiff were to have an arrest report or some other document alleging specific crimes, that document still would not cabin the probable-cause inquiry in a retaliatory-arrest case. So long as the facts known to the officer at the time of the arrest supply sufficient basis for a reviewing authority to find probable cause with respect to *some* crime, the Fourth Amendment's probable-cause requirement is satisfied. *See Devenpeck*, 543 U.S. at 155-56. By contrast, in a retaliatory-prosecution case, a plaintiff need address only the charges in the actual indictment or information on which his prosecution was based. If the plaintiff shows a retaliatory motive and a lack of probable cause as to those charges, he can prevail regardless of whether he could have been (but never was) charged with some other crime.

Petitioner's case illustrates the problem. The notice to appear he was given after his arrest alleged two crimes: "disorderly conduct" and "resisting arrest without violence." Pet. App. 4a. Those were the crimes for which, at the time he filed suit, he could fairly be said to have had notice of any need to address the question of probable cause. But eight years later, weeks into trial on petitioner's civil rights claim, the district court permitted the defendant to inject into the case an entirely different charge—disturbing a lawful assembly—that petitioner was required to rebut instead. Tr. 94 (11/26/2014); *see also* Pet. App. 61a-62a.

Allowing defendants to conjure a new basis for probable cause at any point in the litigation means plaintiffs can never be sure as to which charges they will have to respond.

C. Holding that probable cause defeats a claim of retaliatory arrest undermines First Amendment values.

1. The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). When government officials inflict harm on an individual because that individual has engaged in activity protected by the First Amendment, this retaliation "offends the Constitution" and "threatens to inhibit exercise of the protected right." *Crawford-El v. Britton*, 523 U.S. 574, 588 & n.10 (1998).

The consequences of an arrest, even if no charges are ultimately filed and no prosecution is ultimately pursued, are daunting. Individuals can be handcuffed and taken to jail for infractions as minor as failing to wear a seatbelt or failing to provide proof of insurance. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). They can be held in jail for two days before a probable-cause determination. *County of Riverside v. McLaughlin*, 500 U.S. 44, 57-58 (1991). And "once they are taken to jail," even "offenders suspected of committing minor offenses" can be repeatedly strip searched. *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 330 (2012).

Nor do the harms from an arrest end after charges are dropped. Individuals who have been arrested are vulnerable to "discrimination by employers, landlords,

and whoever else conducts a background check," because an arrest record is often used to deny an applicant housing or employment. *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting); *see also* Beth Cobert, *"Banning the Box" in Federal Hiring*, U.S. Off. of Personnel Mgmt.: Director's Blog (Apr. 29, 2016), https://tinyurl.com/mebcoko.

And *retaliatory* arrests harm individuals beyond those who are actually taken into custody. The prospect of being arrested will deter many individuals from exercising their First Amendment rights at all, particularly when it comes to criticizing the government. A Riviera Beach resident "of ordinary firmness" who attended the Council meeting or saw the video of petitioner being arrested, handcuffed, and manhandled out of the City Council chambers would surely think twice before speaking his or her mind about the City's policies.

2. Barring retaliatory-arrest suits in any case where there is probable cause effectively authorizes pretextual arrests that target people engaged in protected First Amendment activity. As petitioner has already explained, there are almost limitless opportunities to establish probable cause. *See supra* at 28. Because such a rule immunizes retaliatory arrests whenever a defendant can point, even long after the fact, to some offense for which there was probable cause, it therefore blunts the deterrence and compensation functions served by Section 1983 lawsuits.

Even worse, this rule creates an incentive for government officials to channel whatever retaliatory impulses they may have into arresting their targets. A police officer who hassles or uses excessive force against individuals on account of their protected First

Amendment activities will face liability under the *Mt. Healthy* framework unless he can prove he would have engaged in the same behavior absent his retaliatory motive. But if that officer arrests an individual, the near-universal presence of probable cause for *some* crime will effectively insulate him from liability.

So too with a municipality, like the City of Riviera Beach here. Municipalities encounter their residents on a daily basis through a wide variety of interactions. If they retaliate against a resident for his exercise of protected First Amendment activity by, for example, excluding him from the public library or turning off his utilities or firing him from his government job, they will face liability under the *Mt. Healthy* framework unless they can show they would in fact have taken the same action for legitimate reasons. But if instead they order his arrest when he stands at the lectern during a public comment period—or drives "60 miles an hour in a 55-mile-an-hour zone," Tr. of Oral Arg. at 27, *Maslenjak v. United States*, 2017 WL 2674154 (U.S. June 22, 2017)—under the Eleventh Circuit's rule, they are nearly certain to escape liability.

D. The rule that probable cause cannot save a racially discriminatory arrest should apply to retaliatory arrests as well.

Probable cause does not defeat a Fourteenth Amendment challenge to an arrest. Nor should it defeat a First Amendment challenge.

This Court long ago established that the standard for assessing mixed motives in cases alleging that the government acted for an impermissible purpose is the same whether the claim arises under the First or Fourteenth Amendment. *See Arlington Heights*, 429 U.S.

at 270-71 n.21; *Mt. Healthy*, 429 U.S. at 287 & n.2. And in *Whren v. United States*, 517 U.S. 806 (1996), this Court explained that even if pretextual arrests do not violate the Fourth Amendment, "the Constitution prohibits selective enforcement of the law based on considerations such as race." *Id.* at 813. Thus, the Equal Protection Clause provides a "constitutional basis for objecting to intentionally discriminatory application of laws" governing arrests. *Id.*

The courts of appeals have uniformly read *Whren* to permit equal protection challenges to police seizures, even when those seizures are supported by probable cause, if the plaintiff can show that his race was a factor in the officer's decision to detain him. *See Holland v. City of Portland*, 102 F.3d 6, 11 (1st Cir. 1996); *Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety*, 411 F.3d 427, 440-41 (3d Cir. 2005) *overruled on other grounds by Dique v. N.J. State Police*, 603 F.3d 181 (3d Cir. 2010); *United States v. Miller*, 146 F.3d 274, 279 n.3 (5th Cir. 1998); *Vakilian v. Shaw*, 335 F.3d 509, 521 (6th Cir. 2003); *Chavez v. Ill. State Police*, 251 F.3d 612, 635 (7th Cir. 2001); *Johnson v. Crooks*, 326 F.3d 995, 999-1000 (8th Cir. 2003); *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1166 (10th Cir. 2003); *see also Orgain v. City of Salisbury*, 305 Fed. Appx. 90, 99 (4th Cir. 2008).

The Eighth Circuit illustrates lower courts' inconsistent treatment of probable cause despite this Court's uniform treatment of impermissible motives in *Arlington Heights* and *Mt. Healthy*. On the one hand, the Eighth Circuit has aligned itself with every other circuit to hold that an Equal Protection claim "does not require proof" that the plaintiff "was stopped without probable cause or reasonable suspicion." *Johnson*, 326

F.3d at 999. On the other hand, without any recognition of the inconsistency, it has imposed exactly such a requirement for retaliatory-arrest claims. *McCabe v. Parker*, 608 F.3d 1068, 1075 (8th Cir. 2010).

If the existence of probable cause does not defeat Fourteenth Amendment-based challenges to arrests as a matter of law, there is no reason that it should defeat First Amendment-based challenges. No court has ever explained why a protestor pretextually arrested for jaywalking should be able to challenge his arrest if he was targeted as an African American, but not if he was targeted as a Republican. Nor could one.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-10550

Non-Argument Calendar

D.C. Docket No. 9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff-Appellant,

versus

CITY OF RIVIERA BEACH,
a Florida municipal corporation,

Defendant-Appellee,

MICHAEL BROWN,
an individual, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

(February 28, 2017)

Before HULL, MARCUS, and MARTIN, Circuit Judges.

PER CURIAM:

Plaintiff Fane Lozman brought suit pursuant to 42 U.S.C. § 1983 against the City of Riviera Beach, Flor-

ida ("the City") after he was arrested at a Riviera Beach City Council meeting on November 15, 2006. Lozman claimed his arrest violated the First and Fourth Amendments, and constituted a false arrest under Florida state law. The case was tried before a jury and the jury returned a verdict in favor of the City on all claims. Lozman appeals (1) the district court's denial of his motion for new trial, and (2) various instructions the district court gave the jury. After careful review, we affirm.

I.

A.

Lozman moved to the City in March 2006 and lived in a floating home in the Riviera Beach Marina. After moving there, Lozman learned that the City had proposed a redevelopment plan for the Marina, which sought to revitalize the City's waterfront through the use of eminent domain. While many residents opposed the plan, especially the proposed use of eminent domain, Lozman became "an outspoken critic." He attended City Council meetings in May and June 2006 at which he sharply criticized the Mayor and the Council.

While the City was finalizing its redevelopment plan, the Florida legislature passed a bill prohibiting the use of eminent domain for private development. In an effort to pass the redevelopment plan before the law went into effect, the City Council held a special emergency meeting the day before the Governor was scheduled to sign the bill into law. That evening, the City approved the redevelopment plan. On June 8, 2006, Lozman filed a lawsuit against the City under the Florida Sunshine Law, seeking to invalidate the City's ap-

proval of the redevelopment plan on the ground that the eleventh-hour meeting was convened without sufficient public notice. On June 28, 2006, the Council held a closed executive session to discuss Lozman's suit.[1] During this meeting, Councilperson Elizabeth Wade said:

> I think it would help to intimidate the same way as [the Florida Department of Law Enforcement] is coming to my house. I am wondering if my lines are tapped or whatever. I think they should be questioned by some of our people . . . so that they can feel the same kind of unwarranted heat that we are feeling . . . .

In response, another councilperson said: "I think what Ms. Wade says is right. We do have to beat this thing, and whatever it takes, I think we should do it."

On November 15, 2006, the City Council held a regular public session. Lozman was granted permission to speak during the "non-agenda" public comments portion of the meeting.[2] The events surrounding Lozman's comments at the meeting, and his subsequent arrest, were captured on video. Upon reaching

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[1] Florida law permits city councils to hold closed executive sessions for the purpose of discussing pending litigation with counsel. *See* Fla. Stat. § 286.011(8). Although the sessions are closed to the public, the entire session must be transcribed by a court reporter, and the transcript must be made available to the public upon conclusion of the litigation. *Id.* § 286.011(8)(c) & (e)

[2] At each public meeting of the City Council, once the City Council has completed discussion of the agenda items, there is a non-agenda public comment period during which members of the public can address the Council on matters that were not on the agenda.

the podium, Lozman said, "As is typical, the Mayor and [another Councilperson] aren't here during my comments." The Council remained silent. Lozman proceeded: "The U.S. Attorney's Office has arrested the second corrupt local politician . . . former Palm Beach County Commissioner Tony Masilotti." At that point, Councilperson Wade interjected, "You will not stand up and go through that kind of . . . ." Lozman interrupted Councilperson Wade and said "Yes, I will." Councilperson Wade responded, "No, you won't." Lozman continued with his allegations despite Councilperson Wade's instructions. Wade then called out "Officer," summoning City Police Officer Francisco Aguirre who was providing security for the meeting. As Officer Aguirre approached Lozman at the podium, Lozman, speaking louder, said, "I am informing the citizens that two County Commissioners . . . ." After walking up to Lozman, Officer Aguirre gestured to him and said "Will you walk outside with me[?] I need to talk to you." In response, Lozman said, "I'm not finished," and continued speaking. Officer Aguirre then told Lozman, "You're going to be arrested if you don't walk outside." Lozman responded, "Excuse me? I'm not walking outside, I haven't finished my comments." Councilperson Wade then said, "Well, carry him out." Officer Aguirre handcuffed Lozman. Lozman yelled, "Why am I being arrested! I have a First Amendment right!" Councilperson Wade responded, "If you go out, you won't be arrested." After Lozman was removed from the meeting, the next person to speak was called to the podium. Lozman was charged with disorderly conduct and resisting arrest without violence. The state's attorney determined there was probable cause for the arrest but

dismissed the charges because there was "no reasonable likelihood of successful prosecution."

B.

In February 2008, Lozman filed a § 1983 action against the City. Lozman claimed the City retaliated against him for opposing the City's redevelopment plan by having him arrested at the City Council meeting. Lozman brought claims for: (1) retaliation by false arrest, in violation of the First Amendment; (2) unreasonable seizure, in violation of the Fourth Amendment; and (3) common-law false arrest.

In November 2014 the case went to trial, with Lozman proceeding *pro se*. Among the many instructions the district court gave the jury, Lozman challenges two on appeal. The first is the district court's instruction on retaliatory animus. The court instructed the jury that, in order to find the City liable for the First Amendment retaliatory arrest claim, the jury had to find that "a [City] police officer arrested [Lozman] and *the officer* was motivated to take this action because he had an impermissible animus to retaliate against Mr. Lozman for engaging in constitutionally protected speech or conduct." (Emphasis added.)

The second instruction relevant to Lozman's appeal consists of two comments the district court made when instructing the jury on the City's authority to limit the subject matter of public comment during City Council meetings. First, during Lozman's testimony, the court said:

> Clearly, it would not be appropriate for someone to come in and take a copy of the New York Times and just simply read the editorial sec-

> tion of the New York Times, that would have nothing to do with the City of Riviera Beach . . . .

Then, during the final charge, the court said:

> [I]f a chairperson [of the City Council] was saying to Mr. Lozman, Mr. Lozman, you need to sit down because we're only going to hear comments about the City of Riviera Beach, even if they didn't have that rule but if the person was doing that, exercising her discretion or his discretion as the chairperson that would *not* be discriminatory.

(Emphasis added.)

The jury returned a verdict in favor of the City on all counts. Lozman filed a Motion for New Trial, which the district court denied. This appeal followed.

II.

We review a district court's denial of a motion for new trial for an abuse of discretion. *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984). When ruling on a motion for new trial, a trial judge must determine "if in his opinion, the verdict is against the clear weight of the evidence or will result in a miscarriage of justice." *Id.* (quotation omitted and alteration adopted). "To assure that the judge does not simply substitute his judgment for that of the jury, . . . new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence." *Id.* (quotation omitted and alteration adopted).

"We review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party." *Palmer v. Board of Regents*, 208 F.3d 969, 973 (11th Cir. 2000). When reviewing a trial court's jury instruction, "our task is to examine whether the jury charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled." *Id.* (quotation omitted). Reversal is warranted only if the failure to give an instruction prejudiced the requesting party. *Id.*

III.

A.

Lozman first argues that the district court erred in denying his motion for new trial because the jury's verdict finding probable cause to arrest for a violation of Fla. Stat. § 871.01 was against the great weight of the evidence.[3]

Probable cause "constitutes an absolute bar" to a claim for false arrest. *Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998). That is true whether the false arrest claim is brought under the First Amendment, *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002), the Fourth Amendment, *Rankin*, 133 F.3d at 1430,

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[3] The City argues Lozman waived this claim by failing to argue in his motion for new trial that the probable cause finding was against the great weight of the evidence. Reading Lozman's motion for new trial in light of our rule to construe *pro se* filings liberally, *see Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam), we are not convinced he waived the issue. In any event, we need not rule on the City's waiver argument because we deny Lozman's claim on the merits

1435, or state law, *id.* at 1435. Thus, for all three false arrest claims, the district court instructed the jury that, in order to find in favor of Lozman, the jury had to find that "the arresting officer lacked probable cause to believe that Mr. Lozman had or was committing a crime." The jury was instructed, more specifically, to consider whether the officer had probable cause to arrest Lozman for the offense of Disturbing a Lawful Assembly, Fla. Stat. § 871.01(1). By finding for the City on the three false arrest claims, the jury thus found Officer Aguirre did have probable cause to arrest Lozman for disturbing a lawful assembly under § 871.01(1).

Lozman argues the district court erred in denying his motion for new trial because the jury's finding of probable cause was against the great weight of the evidence. We disagree. In order for probable cause to exist, "an arrest must be objectively reasonable under the totality of the circumstances." *Rankin*, 133 F.3d at 1435 (quotation omitted and alteration adopted). This standard is met when "the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Id.* (quotation omitted).

To obtain a conviction under § 871.01(1), the State must prove three elements: (1) the defendant "must have deliberately acted to create a disturbance[,] [t]hat is, he must act with the intention that his behavior impede the successful functioning of the assembly in which he has intervened, or with reckless disregard of

the effect of his behavior"; (2) "[t]he acts complained of must be such that a reasonable person would expect them to be disruptive"; and (3) "the acts must, in fact, significantly disturb the assembly." *S.H.B. v. State*, 355 So. 2d 1176, 1178 (Fla. 1977).

Based on the evidence before the jury—especially the video footage of Lozman's conduct at the City Council meeting—the jury could have found that Officer Aguirre reasonably believed Lozman was committing, or was about to commit, the offense of Disturbing a Lawful Assembly. The video shows Lozman interrupted and refused to listen to Councilperson Wade when she tried to admonish him; Lozman refused to leave the podium when Officer Aguirre first asked him to "walk outside"; and Lozman then continued to refuse to leave after Officer Aguirre again directed him to "walk outside" or else be arrested. Because Lozman failed to heed Councilperson Wade and Officer Aguirre's directions, and repeatedly failed to leave the podium when directed to do so, Officer Aguirre could have reasonably believed: (1) that Lozman acted with "reckless disregard of the effect of his behavior"; (2) that "a reasonable person would expect [his conduct] to be disruptive"; and (3) that his conduct "significantly disturb[ed] the assembly," or was about to. *See S.H.B.*, 355 So. 2d at 1178. Thus, we cannot say the jury's finding that Officer Aguirre had probable cause to arrest Lozman for a violation of § 871.01(1) went against the great weight of the evidence.

B.

Next, Lozman argues the district court erred in its jury instruction on the First Amendment retaliatory arrest claim, specifically, the part of the instruction on

retaliatory animus. The court instructed the jury that, in order to find for Lozman on this claim, the jury had to find that *Officer Aguirre* possessed a retaliatory animus. However, Lozman's theory at trial was that it was Councilperson Wade—not Officer Aguirre—who was the City official with the retaliatory animus. Lozman claimed that Councilperson Wade caused his arrest by summoning Officer Aguirre to the podium and then directing Officer Aguirre to "carry [Lozman] out." Lozman argues he was entitled to have the jury instructed on this theory of animus and causation, and that the district court erred by instructing the jury that Officer Aguirre was the City official whose animus (or lack thereof) was dispositive of the First Amendment claim.

Lozman's argument is compelling, as he seems to have established a sufficient causal nexus between Councilperson Wade and the alleged constitutional injury of his arrest. *See Rizzo v. Goode*, 423 U.S. 362, 370-71, 96 S. Ct. 598, 604 (1976) ("[Section 1983] impose[s] liability . . . for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws." (quoting 42 U.S.C. § 1983) (emphasis added)); *Sims v. Adams*, 537 F.2d 829, 831 (5th Cir. 1976)[4] ("The language of § 1983 requires a degree of causation . . . but it does not specifically require 'personal participation.'"). However, even assuming Lozman is right that it was error to restrict the jury's animus inquiry to Officer Aguirre, this error was harmless in light of the

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[4] Under *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), we are bound by all decisions of the former Fifth Circuit handed down before October 1, 1981. *Id.* at 1209.

probable cause finding. *See United States v. Webb*, 655 F.3d 1238, 1249 n.8 (11th Cir. 2011) ("Jury instructions are subject to harmless error review."). The jury's determination that the arrest was supported by probable cause defeats Lozman's First Amendment retaliatory arrest claim as a matter of law. *See Dahl*, 312 F.3d at 1236.

C.

Finally, Lozman argues the district court erred in its jury instructions about the City's authority to restrict public comment at City Council meetings.[5]

In order to prevail on a First Amendment retaliation claim, "the plaintiff must show that the defendant was subjectively motivated to take the adverse action because of the protected speech." *Castle v. Appalachian Tech. Coll.*, 631 F.3d 1194, 1197 (11th Cir. 2011). Lozman claimed the City had him removed and arrested because he opposed the redevelopment plan. As its defense, the City presented evidence that Lozman was removed—regardless of his opposition to the redevelopment plan—simply because his comments violated the rules governing the non-agenda public comment period of City Council meetings. More specifically, the City argued Lozman's remarks about the arrest of a county commissioner violated the rule that comments during the non-agenda public comment period, while not limited to an agenda item, must still relate to City

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[5] The City argues Lozman waived this claim by failing to argue it before the District Court. Again, although we are not convinced that he waived the issue, *see Tannenbaum*, 148 F.3d at 1263, we need not rule on the City's waiver argument because we deny the claim on the merits.

business. Lozman countered with testimony showing no such requirement existed and that, during the public comment period, residents could speak on any topic, whether related to City business or not. Thus, one of the fact issues for the jury was whether a person during the public comment period could speak only about a topic related to City business. The district court instructed the jury, both during trial and in its final charge, that the First Amendment would not prohibit a city from imposing this sort of restriction if it wanted to.

Lozman argues that two comments the district court made while offering instructions on this subject were error. First, during Lozman's testimony, the court said, "it would not be appropriate for someone to come in [to a City Council meeting] and just simply read the editorial section of the New York Times, that would have nothing to do with the City of Riviera Beach." Then, during the final charge, the court said, "even if [the City Council] didn't have [a] rule" restricting public comment to topics related to City business, it "would not be discriminatory" for the Council chairperson to "exercis[e] her discretion" to say "Mr. Lozman, you need to sit down because we're only going to hear comments about the City of Riviera Beach." Lozman argues these statements effectively told the jury that the City was merely enforcing a valid rule barring speech about non-City matters, instead of allowing the jury to decide whether such a rule existed and whether this rule was what motivated the City's adverse action against Lozman.

Read out of context, it might seem that the district court's comments could have confused the jury by sug-

gesting that the issue of causation—that is, whether the City acted out of an improper retaliatory motive or a legitimate enforcement of its rules—was determined as a matter of law in favor of the City. But these were two isolated remarks, and each was accompanied by a lengthy discussion that clearly presented the fact issue for the jury to decide. After saying "it would not be appropriate" to read The New York Times during the public comment period, the district court continued:

> The jury is going to have to decide what was in the City Council's mind when they [took the adverse action]. Were they trying to retaliate against him because of something he said before? Or were they saying, You're not obeying our rule today, and you need to stop. See? That's what the jury is going to have to decide.

Similarly, after saying it "would not be discriminatory" for the Council chairperson to "exercis[e] her discretion" to remove Mr. Lozman for speaking about non-City matters, the court explained:

> You're looking at what is in the mind of the person making the decision. So if the chairperson says to Mr. Lozman, you need to sit down, if [the chairperson is] doing it because they believe they're enforcing a rule of procedure, and they're not doing it to strike back at Mr. Lozman, then Mr. Lozman would not have established a discriminatory animus. But if Mr. Lozman has proven to you that they did have a discriminatory animus then he would have established that fact no matter what they say. In other words, just because someone says, wait a minute, you're violating this rule or that

> rule, if what's really in their mind is that they're trying to strike back at Mr. Lozman, that would not be appropriate. That would not be permissible. So remember when we're talking about discriminatory animus we are looking at what is in the mind of the person making that decision. Are they just trying to run an orderly meeting or are they trying to strike back at Mr. Lozman because he engaged in constitutionality protected speech or conduct?

Taking the court's instructions "as a whole," the two comments Lozman complains of would not have misled the jury. *Christopher v. Cutter Labs.*, 53 F.3d 1184, 1190 (11th Cir. 1995); *see also Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1283 (11th Cir. 2008) ("When the instructions, taken together, properly express the law applicable to the case, there is no error even though an isolated clause may be inaccurate, ambiguous, incomplete or otherwise subject to criticism." (quotation omitted)). The district court correctly stated the law concerning the City's authority to restrict public comment during its Council meetings. Further, the court correctly advised the jury that, even if the City claimed to be enforcing such a restriction, the jury would need to decide whether this was pretext for a retaliatory motive. "So long as the instructions accurately reflect the law, the trial judge is given wide discretion as to the style and wording employed in the instructions." *Palmer*, 208 F.3d at 973. The district court was well within its discretion to phrase the instructions as it did.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-CIV-80134-HURLEY

FANE LOZMAN,

Plaintiff,

vs.

CITY OF RIVIERA BEACH,

Defendant.

_____/

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT & DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Fane Lozman ("Lozman") filed a Second Amended Complaint against the City of Riviera Beach ("the City") pursuant to 42 U.S.C. § 1983, alleging that the City, through the actions of its city council members, retaliated against him for criticizing a municipal redevelopment project and opposing what he perceived as improper conduct of various council members, in violation of his First, Fourth and Fourteenth Amendment rights under the United States Constitution. He also asserts supplemental state law claims against the City for false arrest, battery and conversion.

The case is now before the court on the parties' cross-motions for summary judgment [DE Nos. 383, 408]. For reasons discussed below, the court will grant in part and deny in part the City's motion for

summary judgment, and will deny Mr. Lozman's motion for partial summary judgment.

I. Factual Background[1]

In March, 2006, Mr. Lozman moved to Riviera Beach and leased a slip at the city's marina for his "floating home," a two-level, house-like plywood structure with empty bilge space underneath the main floor to keep it afloat. Shortly after taking up residence, Mr. Lozman learned of the City's interest in a $2.4 billion redevelopment project for the marina, a plan contemplating the seizure of thousands of homes through the power of eminent domain and the transfer of property to a private developer.

Lozman was publicly critical of the City's redevelopment plan, as well as the corruption that he perceived was prevalent throughout the City's government, and routinely voiced those criticisms at public meetings of the Riviera Beach City Council and the Riviera Beach Community Redevelopment Agency (CRA) between the years 2006 – 2013.

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[1] The Background Facts are either undisputed, or read in the light most favorable to the plaintiff, as the nonmoving party, as they relate to the defendant's motion for summary judgment on the constitutional and supplemental state law claims, even though the facts accepted at the summary judgment stage of the proceeding may not be the actual facts of the case. *Davis v Williams*, 451 F.3d 759, 763 (11th Cir. 2006). Conversely, in determining the plaintiff's cross-motion for partial summary judgment on the conversion claim, the court views the facts relating to that claim in the light most favorable to the defendant, in its evaluation of the plaintiff's cross motion for summary judgment.

On May 10, 2006, Riviera Beach police officers, acting at the direction of the City Council Chairperson, forcibly removed Lozman from a regularly scheduled meeting of the city council. Later that evening, the city council denied him access to a "special meeting" of the council. A few weeks later, on June 7, 2006, Lozman filed suit in state court against the City and various city council members alleging a violation of Florida's Government-in-the-Sunshine Act based on its closure of this meeting.

On June 28, 2006, the city council held a scheduled closed-door executive session. A transcript of that proceeding, which has since been made a public record, reveals at least two members of the city council discussing the need to find out who was behind Lozman's Sunshine Act suit, and "to use every reasonable tool that we have to find out who they are, what we are up against, so that we can map our strategy out." [DE 383-10, p. 36]. Responding to these comments, council member Elizabeth Wade said:

> I think it would help to intimidate the same way as FDLE is coming to my house. I am wondering if my lines are tapped or whatever. I think they should be questioned by some of our people on a legitimate pay scale basis so that they can feel the same kind of unwarranted heat that we are feeling, and I am going to caution that the city has been there before . . . It is the climate . . . . We can go in there and be as right as right can be, but if that Judge is already preconcluded [sic], you got the governor's hand in this, or supposedly in this, because all we have got is hearsay that his hand is in it. You understand what I

am saying? You got FDLE knocking at my door.

[DE 383-10, pp. 37-38]. The Council Chairperson, Ann Isles, later wrapped up the discussion with the comment, "I would like to offer up a consensus that we spend whatever. If you need a private investigator, whatever you need. If you need somebody to shadow every name that's on this document, I ask for a consensus that we spend those dollars and get it done, so we send one message. This is our house, and we are going to stay, and there ain't none of them going to run us away." [DE 383-10, p. 43]. When Ms. Iles then asked "Do we have a consensus of what Ms. Wade is saying," council member James Jackson responded, "I think what Ms. Wade says is right. We have to beat this thing, and whatever it takes, I think we should do it." City Attorney Pamela Ryan responded "Okay," as did council member Norma Duncombe. [DE 383-10, pp. 44].

As expressed at the outset of this closed door executive discussion, multiple council members shared a concern about who was funding Lozman's Sunshine Act suit, and whether there was connection between Lozman and the offices of then Governor Bush and Attorney General Crist, governmental bodies which had also been critical of the city's redevelopment project and which the council suspected may have cooperated with Lozman in his pursuit of the Sunshine Act Lawsuit.

Although there is no record evidence that the City actually hired a private investigator to investigate or follow Lozman, the record does show that shortly after the conclusion of this closed-door meet-

ing, Lozman became the target of a string of legal pressures applied by the city council or its police department, summarized here as follows:

(a) On September 11, 2006, the City filed an eviction action in state court seeking to evict Lozman's floating home from the marina. Lozman successfully asserted a First Amendment retaliation defense to the eviction action, and the City lost its bid to evict the structure from its marina.

(b) On November 15, 2006, then Riviera Beach City Council Chairperson Elizabeth Wade directed city police officers to forcibly remove Lozman from the podium during the public comment, "non-agenda" section of a city council meeting, within less than a minute after Lozman began speaking about the U.S. Attorney's Office current efforts to crack down on public corruption in Palm Beach County and the recent arrest of Palm Beach County Commissioner Tony Massilloti. Responding to the Chairperson's direction, Officer Francisco Aguirre handcuffed Lozman during the middle of his speech, escorted him from the meeting and transported him to the City of Riviera Beach police headquarters, where Lozman was charged with disorderly conduct and trespass after warning. Sometime later, the charging document was altered, with a "white-out" of the trespass charge, and replacement with the words "resisting w/out violence, to wit obstruction." Ultimately, on January 17, 2007, the Palm Beach County State Attorney's office *nolle prossed* both charges.

(c) Over the course of the next several years, City of Riviera Beach police officers stopped Lozman on at least 15 different occasions, threatening to arrest him

for walking his 10-pound dachshund on marina property.

(d) Over the course of the next several years, Lozman was repeatedly escorted from city council or CRA meetings, the City Hall building or the City Council Chambers by Riviera Beach police officers acting at various times under the direction of city council members Liz Wade, Ann Isles, Cedrick Thomas, Dawn Pardo and Gloria Shuttlesworth. On those occasions when he was not physically removed, council members "censured" or silenced Lozman by interrupting his remarks or threatening police intervention.

(e) On July 9, 2008, Lozman's former attorney, Robert Bowling, sent a formal written "notice of claim" to the City, pursuant to § 768.28(6), Fla. Stat., asserting First Amendment, Fourth Amendment and Fourteenth Amendment violations, as well as a state law claim of false arrest, based on Lozman's November 15, 2006 arrest, and the City's forcible removal of Lozman from the May 2006 regular meeting of the city council, as well as various other unspecified retaliatory acts of censure and antagonism.

(f) On April 1, 2009, the City cut off Lozman's electricity at the marina for a period of nearly three weeks, finally restoring it on April 20th, three days after being ordered to do so by a state court judge.

(g) On April 20, 2009, the City initiated an *in rem* federal admiralty action against Lozman's floating residence in the United States District Court for the Southern District of Florida. The City requested and obtained an *ex parte* arrest warrant authorizing the seizure of Lozman's floating home, without disclosing

that Lozman had prevailed in a prior state eviction proceeding initiated by the City, and that just three days earlier a state court judge issued an order directing the City to restore electricity to the floating home.

When Lozman and a local television cameraman witnessed the arrest of the structure and attempted to film the procedure, from the vantage point of a nearby public parking lot, a Riviera Beach Police Commander approached them and, in a loud voice, threatened to arrest them both if they did not stop the filming.

(h) On October 21, 2009, then City Council Chairperson Dawn Pardo directed two police officers to remove Lozman from a City Council meeting for failing to yield the podium. Lozman claims that the officers threw him to the floor in the process of forcibly removing him from the meeting, while Pardo, City Attorney Pamela Ryan and other members of the city council laughed and mocked him in his stricken state.

(i) On November 18, 2009, the United States District Court, exercising its admiralty jurisdiction, entered partial summary judgment in favor of the City, and on January 6, 2010, entered final judgment against the *in rem* defendant, i.e., the floating home, which the court ruled was a "vessel," in the amount of $3,039.88, plus custodial fees, and further ordered that the "vessel" be sold at a U.S. Marshal sale to pay the judgment. *City of Riviera Beach v. That certain unnamed gray, two story vessel approximately fifty-seven feet in length, etc., in rem*, Case No. 09-80594-Civ-Dimitrouleas (S.D. Fla. 2010) [DE 159]. On Feb-

ruary 9, 2010, the City purchased the floating home at a U.S. Marshal's public auction in Miami, outbidding the public that attended the auction, and subsequently destroyed it at a cost of $6,900.00.

(j) In the interim, Lozman's appeal of the district court's final judgment worked its way to the United States Supreme Court, which ultimately determined, by opinion issued January 15, 2013, that Lozman's floating home was not a vessel for purposes of admiralty law, and that the district court therefore lacked subject matter jurisdiction over the City's action. *Lozman v. City of Riviera Beach, Florida,* ___ U.S. ___, 133 S. Ct. 735 (2013). On September 25, 2013, on remand from the United States Court of Appeals for the Eleventh Circuit Court, the district court dismissed the action for lack of subject matter jurisdiction. *City of Riviera Beach v. That certain unnamed gray, two story vessel, etc.*, Case No. 09-80594-Civ-Dimitrouleas [DE 210].

II. Plaintiff's Complaint

Based on the foregoing allegations, Plaintiff's Second Amended Complaint asserts six constitutional claims against the City under 42 U.S.C. § 1983: (1) a First Amendment retaliation claim based on the City's alleged retaliatory lawsuits, arrests and campaign of harassment; (2) a First Amendment right to petition claim based on the City's alleged interference with Lozman's right to petition the government for redress of grievances; (3) a Fourth Amendment unlawful seizure claim based on the City's alleged false arrest of Lozman's person; (4) a Fourth Amendment unlawful seizure claim based on the City's alleged unlawful false arrest and seizure of Lozman's floating

home; (5) a Fourteenth Amendment Substantive Due Process and Procedural Due Process claim based on the City's alleged implementation of a punitive, retaliatory legal campaign designed to deprive Lozman of his right to petition the government and exercise free speech; (6) a Fourteenth Amendment Equal Protection claim based on the City's alleged selective and discriminatory enforcement of city ordinances, regulations and rules against Lozman. In addition, Lozman's Second Amended Complaint includes three supplemental state law claims for false arrest, battery, and conversion.

In earlier formulations of his complaint, Lozman named as defendants the City of Riviera Beach, the City of Riviera Beach Community Redevelopment Authority (CRA), and numerous individual members of the Riviera Beach City Council. In his now operative Second Amended Complaint, Lozman has dropped all of the previously named individual city council members as well as the CRA as party defendants, leaving only the City of Riviera Beach named as a defendant to this cause.

Because the City of Riviera Beach is a municipal entity, it can be held liable under § 1983 only if the alleged constitutional violations resulted from the execution of the City's own policies. *Monell v. Dept. of Social Services of the City of New York,* 436 U.S. 658 (1978); *City of St. Louis v. Praprotnik,* 485 U.S. 112 (1988). This "official policy" requirement is designed to distinguish acts of the municipality from acts of the employees of the municipality, and to make it clear that municipal liability is limited to action for which the municipality is actually responsible.

To establish the existence of a municipal policy or custom which caused a constitutional violation, the plaintiff in a § 1983 suit may alternatively proceed with proof of: (1) an express policy which caused the constitutional deprivation; (2) a widespread practice or custom which, although not authorized by written or express municipal policy, is so permanent and well-settled that it constitutes a policy, or (3) a constitutional deprivation directed or caused by a person vested with final decision or policy-making authority on behalf of the municipality. *Kujawski v. Board of Com'rs of Bartholomew County, Ind.*, 183 F.3d 734 (7th Cir. 1998).

Where, as here, a policy maker is comprised of a public body consisting of multiple board members, a majority of the members of the council constitutes a final policymaker for purposes of creating *Monell* liability. *Campbell v. Rainbow City, Ala.* 434 F.3d 1306 (11th Cir. 2006); *Matthews v. Columbia County*, 294 F.3d 1294 (11th Cir. 2002); *Mason v Village of el Portal*, 240 F.3d 1337, 1339 (11th Cir. 2001). Accordingly, Lozman may maintain his § 1983 action against the City under a "final policy maker" theory of *Monell* liability only if he shows that the retaliatory actions complained of were directed or authorized by a majority of City Council members who harbored an illegal motivation to punish and deter Lozman from his public advocacy against the City.[2]

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[2] The City of Riviera Beach is governed by a mayor and a five-member city council, for a total of six persons. The mayor serves as the *de facto* chairperson, and votes only in case of a tie or filling a council person vacancy. Under the City Charter, the affirmative vote of a majority of the members present at any meeting is required to adopt any ordinance, resolution, order or

III. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. *Id.*

A party seeking summary judgment bears the initial responsibility for advising the court of the basis for its motion, and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v Catrett,* 477 U.S. 317, 322 (1986). The moving party must establish that there is not triable issue of fact as to all the elements of any issue on which the moving party bears the burden of proof at trial.

In contrast, where the nonmoving party bears the burden of proof on a particular issue at trial, the moving party's initial burden under *Celotex* can be met simply by demonstrating that "there is an absence of evidence" to support the nonmoving party's case. *Celotex,* 477 U.S. at 325. After the nonmoving party meets its initial burden, "the adverse party's response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue

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vote. Thus, the affirmative participation of at least three of the five council members is required for any city action.

for trial." Fed. R. Civ. P. 56(c). Thus, summary judgment is appropriate if the nonmoving party fails to make a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Put another way, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a motion for summary judgment looks beyond the pleadings and requires the nonmoving party – by affidavits, depositions, interrogatory answers or admissions on file – to designate specific facts showing that there is a genuine issue for trial. *Celotex,* 477 U.S. at 324. The nonmoving party may not restate allegations made in its pleadings or rely upon "self-serving conclusions, unsupported by specific facts in the record." *Id.* Rather the nonmoving party must support each essential element of its claims with specific evidence from the record. *Celotex*, 477 U.S. at 322.

Further, evidence introduced to defeat or support a motion for summary judgment must be sworn, competent and on personal knowledge, and set out facts that would be admissible at trial. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991); *Callahan v. A.E.V., Inc.,* 182 F.3d 237, 252 n. 11 (3d Cir. 1999).

The court must view the evidence presented on the motion in the light most favorable to the opposing party, and make every reasonable inference in favor of that party. *Sims v. MVM, Inc.*, 704 F.3d 1327, 1330 n. 2 (11th Cir. 2013). The standards governing cross-motions for summary judgment are the same, although the court must construe the motions inde-

pendently, viewing the evidence presented by each moving party in the light most favorable to the nonmovant. *Shazor v. Professional Transit Management, Ltd.*, 744 F.3d 948 (6th Cir. 2014).

IV. Discussion

A. Constitutional Claims

Section 1983 of Title 42 of the United States Code offers private citizens a means of redress for violations of federal law by state officials. 42 U.S.C. § 1983. The statute provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Id. "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1982). To establish a claim under this section, the plaintiff must show a deprivation of "a right secured by the Constitution and laws" of the United States by a person acting under color of state law.

1. First Amendment Retaliation Claims

An individual has a viable First Amendment claim against the government when he is able to prove that the government took action against him in

retaliation for his exercise of First Amendment rights. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-284 (1977). A plaintiff who brings a retaliation claim under §1983 predicated on the First Amendment must show: (1) he or she engaged in constitutionally protected activity; (2) the defendant's responsive actions were motivated or substantially caused by the exercise of that right, i.e. there was a causal connection between the protected activity and the retaliatory action, and (3) the defendant's retaliatory actions were sufficient to deter a person of ordinary firmness from exercising his or her constitutional rights, i.e. the defendant's actions effectively chilled the exercise of the plaintiff's First Amendment right. *Curley v. Village of Suffern*, 268 F. 3d 65, 73 (2d Cir. 2001); *Thomas v. Independence Township*, 463 F.3d 285, 296 (3d Cir. 2006).

To prove causation, a plaintiff must prove that his speech was the "but-for" cause of the allegedly retaliatory action, *Fairley v. Andrews,* 578 F.3d 518 (7th Cir. 2009), which may be accomplished with proof of: (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory act, or (2) a pattern of antagonism coupled with timing to establish a causal link. *Lauren W. ex rel. Jean W. v. DeFlaminis,* 480 F.3d 259, 267 (3d Cir. 2007); *Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago,* 104 F.3d 1004 (7th Cir. 1997) (pattern of criticism and animosity by supervisors following protected activities supported existence of causal link in Title VII retaliation claim). "In the absence of that proof the plaintiff must show that from the 'evidence gleaned from the record as a whole' the trier of the fact [sic] should infer causa-

tion.'" *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir. 2000).

In this case, the Plaintiff's First Amendment retaliation claim is premised on a series of retaliatory actions – one arrest, multiple threatened arrests, repeated expulsion from public meetings of the city council, an eviction action, an *in rem* action against his floating home, and ultimately the destruction of his floating home – allegedly taken by the City in response to (1) the 2006 lawsuit brought by Plaintiff against the City under Florida's "Government in the Sunshine Act," charging the improper conduct of official municipal business behind closed doors; (2) the Plaintiff's public criticism of the City's proposed redevelopment plan, (3) the Plaintiff's public criticism of the integrity of various municipal officials. The Second Amended Complaint pleads facts, and the summary judgment record contains evidence, showing that Plaintiff regularly attended public meetings of the City of Riviera Beach City Council, and its related arm, the City of Riviera Beach Community Redevelopment Authority (comprised of the same individuals who served on the City Council); that he engaged in expressive political speech during those meetings; that he engaged in protected petition activity by filing his Sunshine Act suit against the City; that he was arrested or threatened with arrest contemporaneously or shortly after engaging in this protected activity, and that he was sued in state and federal court by the City in an attempt to evict his person and floating residence from the City marina shortly after engaging in this protected activity.

The City contends that Lozman's arrests were justified, and therefore cannot form the premise of an

unlawful retaliation claim. If, in fact, a § 1983 plaintiff was engaged in the commission of a crime when he was arrested, his First Amendment interests necessarily yield, and inquiry into the government's motive for making the arrest becomes unnecessary. *Curley v. Village of Suffern*, 268 F.3d 65 (2nd Cir. 2001). However, in this case, the record suggests, at a minimum, a genuine issue of material fact on the question of whether City of Riviera Beach police officers had probable cause to arrest Plaintiff for disorderly conduct or resisting arrest without violence during the November 2006 arrest incident alleged in the complaint. Therefore, the fact of Plaintiff's arrest does not eliminate further inquiry into the causation element of his First Amendment retaliation claim to the extent based on the false arrest of his person.

There is also record evidence of a very close temporal connection between the timing of Plaintiff's expressive speech and the filing of the Sunshine Act suit, and the City's exertion of an extended string of legal pressures against Lozman – proximity in time which constitutes some circumstantial evidence of improper motive behind the City's actions. That is, the record plainly shows that Lozman was engaged in expressive political speech, as well as the valid exercise of his right to petition the government, at a time just prior to the adverse municipal actions alleged. This is adequate circumstantial evidence of causation to survive summary judgment on Plaintiff's First Amendment retaliation claims. *Jones v. Parmley,* 465 F.3d 46, 56 (2d Cir. 2006).

This leaves the issue of the City's *Monell* liability as the final element of the Plaintiff's § 1983 First Amendment retaliation claim under challenge by the

City's current motion for summary judgment. As stated above, under *Monell,* a municipality cannot be held liable solely because it employs a tortfeasor – i.e. it cannot be held liable on a *respondeat superior* theory. *Monell,* 436 U.S. at 691. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. *Id.*

The word "policy" implies a course of action consciously chosen from various alternatives. In the *Monell* sense, a policy may be expressly chosen by a municipal body, e.g. by statute, regulation, rule or ordinance; the existence of an official policy may be inferred from municipality inaction or "deliberate indifference" in the face of a widespread custom or usage of constitutional deprivations perpetuated by municipal employees or agents; or, a person vested with final decision-making authority on behalf of the municipality can take action which is said to constitute municipal policy.

With regard to final decision-maker theory, the court finds, first, that the record contains evidence reasonably susceptible to inference that the Council Chairperson in 2006, Elizabeth Wade, harbored illicit motivation to punish and deter Lozman based on his exercise of free speech and petition of government, and that a majority of the city council members in attendance at that time – and a majority of members constituting later formulations of the council – approved and endorsed Wade's retaliatory sentiments when they initiated, endorsed, or directed a series of legal pressures against Lozman – including the at-

tempted eviction from the marina, the arrest and threatened arrests, the seizure and destruction of Lozman's floating residence, the termination of his electricity, and the invasion of his privacy by unauthorized photography of his person inside of his home. That Lozman became the target of this extended string of legal pressures shortly after he filed his Sunshine Act suit and shortly after he began criticizing the city's municipal policies is some circumstantial evidence that a majority of members on the city council harbored the illegal retaliatory motivation expressed by Council Chairperson Wade, at least enough to raise a jury issue on the question of whether a majority of the council acted with unlawful motivation when it authorized and initiated legal proceedings to remove Lozman and his floating home from the City of Riviera Beach marina community. At trial, the Plaintiff will have the burden of demonstrating that each alleged retaliatory action represented an action taken with the support of at least three council persons harboring such illegal motivation; for summary judgment purposes, the court finds sufficient circumstantial evidence on record to raise a jury question on this *Monell* element of claim. *Schlessinger v. The Chicago Housing Authority*, 2013 WL 5497254 (N. D. Ill. 2013).

Alternatively, the record is also susceptible to a finding of an unconstitutional policy, either express or as applied, in the embodiment of the city council's "Rules of Decorum" invoked as a basis for Lozman's expulsion from various city council meetings. If the relevant "Rules of Decorum" on their face, or as applied to Lozman, constituted an unreasonable restriction on Lozman's First Amendment right of free ex-

pression in the subject forum, to wit, the public comment, non-agenda portion of open city council meetings, these rules may serve as evidence of an express municipal policy which caused the First Amendment deprivations complained of by Lozman, thereby satisfying the *Monell* element of his First Amendment retaliation claim.

The City questions whether the correct rules have been cited by Plaintiff (i.e. whether he has cited the rules in effect at the time of the alleged constitutional infringements), but does not affirmatively show that the rules in effect during the relevant city council meetings are different in any material respect from the rules referenced by Plaintiff, nor has either party addressed the constitutional permissibility of the substantive content of the rules, facially or as applied, in their respective briefing on the current motions for summary judgment. On this record, the court finds a genuine issue of material fact on the content of the relevant "Rules of Decorum," as well as a mixed fact/law issue on the question of whether these rules evince an unconstitutional express policy of the City which caused the First Amendment constitutional deprivations alleged, thereby establishing the *Monell* liability element of claim.

The City also argues that Lozman's complaint does not sufficiently allege the existence of an express municipal policy based on the City Council's formal "Rules of Decorum," so as to put the City on fair notice of this theory of liability, and that it would be unfair to allow expansion of the pleadings at the summary judgment stage to accommodate this alternative theory of *Monell* liability. The court is not persuaded by this notice argument, however. The Plain-

tiff's Second Amended Complaint does allege that the complained of conduct was taken "pursuant to a custom, policy or decision made by a governmental official with final policymaking authority" [Second Amended Complaint, ¶ 40], an allegation which subsumes the theory that the complained of conduct was the product of an express policy promulgated by a final decision maker.

As a third alternative premise of *Monell* liability, the court also finds sufficient evidence to withstand summary judgment on the issue of widespread practice or custom of constitutional deprivations perpetrated by the city agents or employees against Lozman, from which the existence of an official municipal policy may be inferred. While the defendant contends that multiple constitutional deprivations directed toward a single individual is not sufficient to constitute a "custom and practice" evidence in the *Monell* sense, and that a § 1983 plaintiff suing a municipality must instead show a series of unrelated incidents involving different persons to show informal practice or custom, it does not cite any legal authority for this proposition. Further, there is nothing in the policy rationale underpinning *Monell* which would support such a formulation of the rule.

Under *Monell*, a policy may be inferred from circumstantial proof that a municipality displayed a deliberate indifference to the constitutional rights of an individual, either by failing to train its employees, or by a repeated failure to make any meaningful investigation into multiple complaints of constitutional violations after receiving notice. *Ricciuti v. N.Y.C. Transit Authority*, 941 F. 2d 1119, 1123 (2d Cir. 1991). Whether a municipality's failure to respond

involved a string of unrelated incidents involving different people, or a string of related incidents involving the same individual – the logical inference available from such a course of "deliberate indifference" is the same, i.e. that the municipality encouraged, or at least condoned, a course of unconstitutional activity by failing to take action to deter or eliminate it. Thus, "repeated, constitutional failures with respect to one individual 'as well as a culture that permitted and condoned violations of policies' may be sufficient to withstand summary judgment on a *Monell* claim." *Mayes v. City of Hammond, Indiana,* 2006 WL 2193048 (N.D. Ind. 2006) (quoting *Woodward v. Correctional Med. Servs. of Illinois*, 368 F.3d 917, 929 (7th Cir. 2004)).

In this case, the basis for *Monell* liability on a custom and practice theory is not premised solely on the City's alleged extended retaliatory course of legal pressure and harassment directed toward Lozman, but rather is the combination of the multiple alleged retaliatory acts and deprivations made in an alleged attempt to eliminate Lozman from the marina community, along with evidence of a culture that permitted and condoned the constitutionally impermissible retaliatory gestures, including the City of Riviera Beach's apparent lack of any policies or protocols concerning the proper handling of alleged Sunshine Act violations and appropriate litigation conduct toward the litigants involved.

In this case, there is ample evidence from which a jury could reasonably conclude that the City was on notice of one arrest and multiple threatened arrests lacking probable cause, as well as a series of legal actions prompted by questionable animus from a con-

stitutional standpoint, endorsed or initiated by various members of the city council, and that by failing to investigate and take any remedial action to deter the misconduct, the City encouraged or condoned the misconduct, effectively adopting it as its own. Thus, the court finds facts which may support Plaintiff's assertion that a municipal policy based on custom and policy exists, and caused the claimed constitutional injuries. *Estate of Novack ex rel. Turbin v. County of Wood,* 226 F.3d 525, 530 (7th Cir. 2000); *Woodward v Correctional Med. Servs. of Illinois, Inc.,* 368 F.3d 917 (7th Cir. 2004). The court shall accordingly deny the City's motion for summary judgment on the First Amendment retaliation claims under § 1983.

2. Fourth Amendment Claims

Plaintiff asserts two distinct Fourth Amendment claims against the City – one for false arrest of his person, and the other for false arrest of his floating home.

A warrantless arrest without probable cause violates the Constitution and forms the basis for a § 1983 claim. *Marx v. Gumbinner*, 905 F.2d 1503, 1505 (11th Cir. 1990). Conversely, if an arrest is supported by probable cause, the arrestee is absolutely barred from pursuing a § 1983 false arrest claim. *Id* at 1505-06. A false arrest claim under § 1983 is substantially the same as a claim for false arrest under Florida law. A plaintiff must prove three elements to sustain a claim for false arrest under Florida law: (1) an unlawful detention and derivation of liberty against the plaintiff's will; (2) an unreasonable detention which is not warranted by the circumstances and

(3) an intentional detention. *Tracton v. City of Miami Beach*, 616 So.2d 457 (Fla. 3d DCA 1992). Probable cause may be raised as an affirmative defense to a claim for false arrest; that is, an arrest of a criminal suspect by an officer acting with probable cause is a privileged detention. *Id.*, citing *Lee v. Geiger*, 419 So.2d 717 (Fla. 1st DCA 1982), *rev. den* 429 So.2d 5 (Fla. 1983). Probable cause exists "if at the moment the arrest was made, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Holmes v. Kucynda*, 321 F.3d 1069, 1079 (11th Cir. 2003).

Probable cause is evaluated from the viewpoint of a prudent, cautious police officer on the scene at the time of the arrest. *Miami-Dade County v. Asad*, 78 So.3d 660 (Fla. 3d DCA 2012). Hindsight may not be employed in determining whether a prior arrest was made on probable cause; thus, events that occur subsequent to the arrest are irrelevant in assessing a false arrest claim. *Id.* To show probable cause, the arresting officer must have had reasonable grounds to believe that the arrestee committed a crime. The test is an objective one, i.e. a probable cause determination considers whether the objective facts available to the officer at the time of arrest were sufficient to justify a reasonable belief that an offense was being committed. *United States v. Gonzalez*, 969 F.2d 999, 1003 (11th Cir. 1992). Because it is objective, the determination is made without regard to the individual officer's subjective motive or belief as to the existence of probable cause.

In this case, the City argues that the Plaintiff's § 1983 Fourth Amendment claim, based on the November 2006 arrest of his person, is legally insufficient because the arresting officer had probable cause to arrest Plaintiff for disorderly conduct and resisting arrest without violence.

As a threshold matter, there is a genuine issue of material fact as to whether the officer had probable cause to arrest Lozman for disorderly conduct at the time of the arrest incident in question. Florida Statutes, § 877.03, defines and proscribes "disorderly conduct" as follows:

> Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace of disorderly conduct shall be guilty of a misdemeanor of the second degree.

The Florida Supreme Court has narrowly construed this statute, so that as applied to verbal conduct, it applies only to words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *State v. Saunders*, 339 So.2d 641 (Fla. 1976). It also applies to words known to be false, reporting some physical hazard in circumstances where such a report would create a clear and present danger of bodily harm to others. That is, the statute has been narrowly interpreted to prohibit "fighting words" or shouting "fire" in a crowded theater. *A.S.C. v. State*, 14 So.3d 1118 (Fla. 5th DCA 2009). Notably, for purposes of the instant discussion, Flori-

da courts have consistently held that unenhanced speech alone will not support a conviction for disorderly conduct. *Id.*

There is no suggestion in the present record that Lozman's conduct precipitating his arrest incited others to breach the peace, or posed an imminent danger to others; thus there is a large question as to whether the arrest was supported by probable cause to believe he engaged in disorderly conduct, which, under *Saunders* and its progeny, requires something more than loud or profane language, or a belligerent attitude. *Miller v. State*, 667 So.2d 325, 328 (Fla. 1st DCA 1995). And, if there was no probable cause for Lozman's disorderly conduct arrest, there can be no probable cause for resisting arrest without violence, because the latter crime presupposes that the arrestee was the subject of a valid detention and arrest. This follows because every person has the right to resist, without violence, an unlawful arrest. *Robbins v. City of Miami Beach*, 613 So.2d 580 (Fla. 3d DCA 1993), citing *K.Y.E. v. State*, 557 So.2d 956 (Fla. 1st DCA 1990) (recognizing common law rule that a person may lawfully resist illegal arrest without using force or violence). In other words, if there was no probable cause for Lozman's arrest for disorderly conduct, or some independent crime, he could not lawfully be arrested for "resisting arrest without violence," because the latter is not a "stand alone" crime. *Lee v. State*, 368 So.2d 395 (Fla. 3d DCA 1979) (failure of state to prove that the arrest which defendant resisted was lawful made it necessary to reverse conviction for resisting arrest without violence).

Because the record, at best, reveals a genuine issue of material fact on the question of whether the

police officers had objective reason to believe Lozman was engaged in "disorderly conduct" at the time of the subject arrests, there is an issue as to whether his arrests were supported by probable cause, and the City is not entitled to summary judgment on the Fourth Amendment false arrest of the person claim.

With regard to the alleged false arrest of property claim, however, the City acted with the authority of the federal admiralty court when it arrested and seized Lozman's floating home, which the court finds, as a matter of law, constitutes "probable cause" for that arrest and seizure. That it was later determined the district court lacked subject matter jurisdiction to issue the order does not detract from the probable cause that existed at the time of the arrest. It is axiomatic that hindsight should not be used to determine whether a prior arrest or search was made with probable cause. *Miami-Dade County v Asad*, 78 So.3d 660 (Fla. 3d DCA 2012). Thus, events that occur subsequent to the arrest are irrelevant in a false arrest claim because whether a false arrest was made turns on whether there was probable cause at the time of the arrest; i.e. subsequent events cannot remove the probable cause that existed at the time of the arrest. *Id.*, citing *McCoy v. State*, 565 So.2d 860 (Fla. 2d DCA 1990).

Therefore, accepting the allegations of the Second Amended Complaint as true, and reading the record evidence in the light most favorable to Lozman, it is clear that the City had probable cause to arrest Lozman's floating home at the time of the arrest and seizure. The fact that the federal district court which issued the order was later found to have lacked subject matter jurisdiction over the matter, requiring it

to vacate its final judgment for the City, does not change the fundamental probable cause analysis for the Plaintiff's Fourth Amendment false arrest of property claim. The court shall accordingly grant the City's motion for summary judgment on this prong of the Plaintiff's § 1983 Fourth Amendment false arrest claim.

3. Fourteenth Amendment Equal Protection Claim

To plead a selective enforcement claim under the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must proffer sufficient factual allegations to show that: (1) plaintiff was treated differently from other similarly situated individuals, and (2) such differential treatment was based on impermissible considerations, such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. *Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001). The comparison must be to those who are "similarly situated in all material respects." *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997). Alternatively, to show a "class of one" equal protection claim where a plaintiff asserts that he was irrationally discriminated against on an individual basis, rather than as member of a particular group, the plaintiff must show he was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). To be "similarly situated," under this rubric, the comparators must be "*prima facie* identical in all relevant respects." *Grider v. City of Auburn, Ala.*, 618 F.3d

1240, 1264 (11th Cir. 2010); *Thorne v. Chairperson Fla. Parole Comm'n*, 427 Fed Appx 765, 771 (11th Cir. 2011).

The test for determining whether other persons similarly situated were selectively treated is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent. *Penlyn Development Corp. v. The Incorporated Village of Lloyd Harbor*, 51 F. Supp. 2d 255, 264 (E.D.N.Y. 1999).

Plaintiff's selective enforcement claim in this case is based on allegations that other members of the audience at city council meetings who spoke critically of the City or the integrity of its City Council members were not similarly interrupted and forcibly removed from the podium; that other City marina residents who did not publicly advocate against the city's planned redevelopment project were not similarly targeted for eviction from the marina, through legal process and other "self-help" eviction tactics, and were not subject to similar harassment by city police and city employees (dog-walking stops, and invasive photography of Plaintiff in his home).

The City argues that the Plaintiff fails to show sufficient similarity of comparators to state an equal protection selective enforcement claim, where the alleged conduct of other audience members is not similar to that of Plaintiff, where it is not alleged that they disrupted the council meetings times by speaking off-topic, at high volume, and over the members of the council, and further, that the alleged conduct of other marina lessees is not similar to Plaintiff, where it is not alleged that they were significantly delin-

quent in their dockage fees, or had dogs that were aggressive toward other dogs or people.

The City also points out the video of the January 3, 2007 meeting of the City Council shows that another audience member, Christi "Pepper" Newman, was also removed from the podium right after Lozman was removed. According to the City, Pepper, like Lozman, was similarly situated in the sense her speech was critical of the City (she complained that the City was remiss for not standing up to Lozman and suing him for slander), and she was also forcibly removed from the podium. As to the eviction efforts and ultimate seizure of Lozman's floating home, the City notes that Lozman has not identified any other marina residents with floating homes or vessels who were "similarly situated" in the sense that they were in violation of marina "wet slip" agreements by way of a failure to satisfy arrearage for dockage fees.

The court concludes that the selective enforcement claim fails because the summary judgment record does not contain sufficient evidence from which a reasonable person could infer that the Plaintiff and other council meeting audience members were similarly situated, or that Plaintiff and other marina residents and lessees were similarly situated. Because the record does not contain sufficient factual allegation from which disparate treatment can be inferred, the court shall grant the City's motion for summary judgment on Lozman's Fourteenth Amendment Equal Protection claim.

4. Fourteenth Amendment Due Process Claims

Lozman also alleges that the City violated his Substantive and Procedural Due Process rights under

the Fourteenth Amendment through the conduct of its campaign to harass, retaliate and punish Lozman for his public criticism of the City and certain City officials [Second Amended Complaint, paragraph 42]. However, a § 1983 claim cannot be sustained based on the filing of criminal charge without probable cause under the substantive due process or procedural due process protections of the Fourteenth Amendment. *Becker v. Kroll*, 494 F.3d 904 (10th Cir. 2007), citing *Albright v. Oliver*, 510 U.S. 266 (1994). The underpinning theory is that the more general due process considerations of the Fourteenth Amendment are not a fallback to protect interests more specifically addressed by the Fourth Amendment in the § 1983 context. *Id.*, citing *Albright* at 273 (quoting *Graham v. Connor*, 490 U.S. 386 (1989).

Under this same rationale, the Plaintiff's substantive due process claim fails to the extent based on a First Amendment violation, because "a cause of action cannot be based in substantive due process where a more specific constitutional provision is applicable," and a "substantive due process right to free speech is duplicative of [a] First Amendment retaliation claim." *Bradenburg v. Housing Authority of Irvine*, 253 F.3d 891, 900 (6th Cir. 2001). The court shall accordingly grant the City's motion for summary judgment on the § 1983 claim to the extent premised on alleged Fourteenth Amendment Substantive and Procedural Due Process violations.

5. Riviera Beach Community Redevelopment Agency

The City argues that the Riviera Beach Community Redevelopment Agency (CRA) is a legal entity

which is separate and distinct from the City of Rivera Beach, and that the City accordingly cannot be liable for any constitutional deprivations or tortious conduct attributed to members of the CRA. See §163.357(1), Fla. Stat. (2013). On this tenet, it moves for summary judgment on all claims to the extent premised on conduct of CRA members, as described in the Plaintiff's Second Amended Complaint at paragraphs 1, 15-18, 2(c),28(d), 28(g), 28(i), 48(b), and 66.

Upon consideration, the court has determined to defer its ruling on this ground of the City's motion for summary judgment.

B. State Law claims

1. Failure to comply with conditions precedent

On the supplemental state law claims, the City argues that all of Lozman's state claims should be dismissed with prejudice for Plaintiff's failure to comply with pre-suit notice requirements of § 768.28(6), Fla. Stat. (2013). The City contends that because no pre-suit notice was given, and because the three-year statute of limitation on these claims has expired, it would be futile to give Lozman an opportunity to provide the notice now and re-plead his complaint accordingly. Thus, the City moves for summary judgment on all state claims for failure to satisfy all conditions precedent to suit.

Lozman contends that his former attorney, Robert Bowling, sent a pre-suit notice on July 9, 2008 to City Attorney Pamela Ryan, as well as to the City's outside litigation counsel, Benjamin Bedard. He supports this contention with an affidavit identifying a

letter issued on "Cobb & Cole" firm letterhead, addressed to Pamela Ryan, City Attorney for Riviera Beach, which describes certain First, Fourth Amendment and Fourteenth Amendment claims against the City based on Lozman's arrest in November 2006, and an antagonistic course of conduct that followed. Lozman concedes that the Second Amended Complaint does not specifically allege the giving of pre-suit notice through this letter, and asks for permission to amend his complaint to do so.

The court shall grant Lozman's request to amend his complaint by interlineation to allege the giving of pre-suit notice as to the November 2006 false arrest and battery claims, which are fairly identified in Attorney Bowling's notice of claim. However, this notice cannot be read to cover claims which accrued after that point in time, such as the alleged battery arising from the October 2009 incident or the conversion claim arising from the City's arrest and seizure of Lozman's floating home in November 2009.

Further, as to the battery claim arising out of the October 2009 incident, Lozman failed to file the requisite notice within three years of the accrual of his claim, as required by § 768.28(6), Fla. Stat. (2013). Because this is not in the nature of a continuing tort, it would be futile to allow him an opportunity to provide the notice now as the statutory period of limitation has expired. Accordingly, the City is entitled to a dismissal with prejudice of the state law battery claim to the extent based on the October 2009 incident, and the court will enter summary judgment in its favor accordingly.

The court reaches a different result, however, on the Plaintiff's state law conversion claim. This claim did not accrue until the point in time that the City's possession of Lozman's floating home became wrongful, which occurred when the Supreme Court ruled that Lozman's floating home did not qualify as a "vessel" and, therefore the district court had lacked subject matter jurisdiction. Under Florida law, the City's lawful possession of the floating home during the course of the admiralty proceeding did not become wrongful simply because Lozman demanded the return of his property during the course of that proceeding. Rather, the conversion action could accrue only after the City lost the protection of the federal district court's authority over the matter in the course of the federal *in rem* admiralty proceedings. *Snell v. Short*, 544 F.2d 1289 (5th Cir. 1977) (conversion claim accrued after police lost protection of order of court or magistrate, not when officers refused plaintiff's demand for return of money).

Since the statute of limitations has not run on Lozman's state law conversion claim, but because he has failed to provide the City with the statutorily required pre-suit notice of claim, the court will dismiss Lozman's state law conversion claim without prejudice, and grant the City's motion for summary judgment on this claim to this limited extent.

C. Plaintiff's Motion for Partial Summary Judgment

Conversion is act of dominion wrongfully asserted over another's property inconsistent with his or her ownership interests. In this case, Lozman contends he is entitled to summary judgment on his common

law conversion claim because the evidence shows he owned the floating residential structure at the time the City arrested and seized it; the City intentionally arrested the floating home in a "sham" federal admiralty action after Lozman prevailed in a state eviction action; the City refused his repeated demands for return of his home (based on the federal court's lack of jurisdiction over the structure) during the course of admiralty proceedings; and the City wrongfully and vindictively destroyed the floating home after purchasing it as highest bidder at a U.S. Marshal sale in Miami, making it impossible to restore the property to Lozman even after the United States Supreme Court ruled in his favor on the invalidity of the jurisdictional threshold underpinning the in rem proceeding.

The common law tort of conversion may lie even if defendant took or retained property on mistaken belief he had a right to possession. *Seymour v. Adams,* 638 So.2d 1044 (Fla. 5th DCA 1994), i.e. a tort may lie even if the act is accomplished without specific wrongful mental intent. *City of Cars, Inc. v. Simms*, 526 So.2d 119 (Fla. 5th DCA), *rev. den.*, 534 So.2d 401 (Fla. 1988). Thus, the court concludes that the initial existence of probable cause to sustain the arrest and seizure of the floating home, as determined by the federal district court in the admiralty proceeding, does not necessarily defeat a claim for common law conversion.

However, the court has concluded this claim is not ripe for adjudication for failure to give pre-suit notice of claim, as required by § 768.28(6), as discussed above, and that the claim is appropriately dismissed from this action without prejudice for the

Plaintiff to reassert it after provision of proper notice and issuance of the City's denial of claim, or expiration of the statutory period within which the City is obligated to respond, whichever comes first. Accordingly, the court shall deny Lozman's motion for partial summary judgment on the state law conversion claim.

V. Conclusion

Based on the foregoing, it is **ORDERED AND ADJUDGED**:

1. The City's motion for summary judgment is **GRANTED IN PART and DENIED IN PART** as follows:

   a. The motion is **DENIED** as to the § 1983 claim based on First Amendment retaliation, and **DENIED** as to the § 1983 claim based on Fourth Amendment false arrest of the Plaintiff's person.

   b. The motion is **GRANTED** as to the § 1983 claim based on Fourth Amendment false arrest of the Plaintiff's floating home.

   c. The motion is **GRANTED** as to the § 1983 claims based on Fourteenth Amendment Substantive and Procedural Due Process violations.

   d. The motion is **GRANTED** as to the § 1983 claim based on Fourteenth Amendment Equal Protection violations.

   e. The motion is **GRANTED**, based on sovereign immunity, as to the state common law claim

of battery to the extent based on the October 2009 incident described in the complaint;

f. The motion is **DENIED** as to the state common law claim of battery and false arrest to the extent based on the November 2006 arrest described in the complaint.

g. The motion is **GRANTED** as to the state common law claim of conversion based on the City's arrest and seizure and destruction of Lozman's floating home, to the extent that court hereby **DISMISSES WITHOUT PREJUDICE** the conversion claim due to Plaintiff's failure to show compliance with the pre-suit notice of claim requirements of § 768.28(6).

2. The plaintiff's motion for partial summary judgment on the common law conversion claim is **DENIED.**

DONE AND SIGNED in Chambers at West Palm Beach, Florida this 19th day of August, 2014.

Daniel T.K. Hurley
Daniel T.K. Hurley
United States District Judge

cc. Fane Lozman, *pro se*
All counsel

APPENDIX C

[1]
[FINAL VERSION] 12-15-14, 5:00 p.m.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-CIV-80134-HURLEY

FANE LOZMAN,

Plaintiff,

vs.

CITY OF RIVIERA BEACH,

Defendant.

_____/

THE LAW

Members of the Jury:

I will now explain to you the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions – what we call your deliberations.

* * *

[5]

FIRST AMENDMENT RETALIATION

On this claim, Mr. Lozman alleges that Riviera Beach officials and employees retaliated against him for engaging in constitutionally protected speech and conduct, *viz.*, for filing a "Government in the Sunshine Act" suit against Riviera Beach, and/or for

speaking against the City's proposed marina redevelopment project, and/or for speaking about public corruption in Riviera Beach.

To prove that he was retaliated against in violation of his First Amendment rights, Mr. Lozman must prove all of the following elements by a preponderance of the evidence:

(1) That he engaged in speech or petition conduct protected under the First Amendment;

(2) That a city official or employee intentionally took "retaliatory" action against him;

(3) That the city official or employee acted under color of law when he or she retaliated against or punished Mr. Lozman; and

(4) That there was a causal connection between the retaliatory action and the protected speech or conduct.

[6] As for the first element, I instruct you that Mr. Lozman's public criticism of the City's proposed marina redevelopment project and any views he expressed about perceived public corruption in the City of Riviera Beach were protected under the First Amendment, as was his conduct in filing a "Government in the Sunshine" suit against the City; therefore, the first element on this claim has been established.

On the second element, a "retaliatory" action is defined as one which would likely deter a person of ordinary firmness from exercising his or her First Amendment rights. To decide whether an action constituted "retaliatory" conduct in the context of this case, you must determine whether the complained-of

action would deter a person of ordinary firmness from exercising their protected speech and/or engaging in their protected conduct. A person of ordinary firmness means a similarly-situated reasonable person in Mr. Lozman's position. This is an objective standard but in determining whether it has been met, the jury may consider whether Mr. Lozman himself was deterred from exercising his First Amendment rights.

As for the third element, while the City denies that any official or employee acted with an impermissible animus toward Mr. Lozman, the City agrees that all of the cited officials and employees – with the exception of Mr. Gilmore (the golfcart driver) – were acting under "color of law," i.e., they acted as municipal employees.

To establish the fourth element – a causal connection between intentional retaliatory conduct and constitutionally protected speech and/or conduct – Mr. Lozman must show that the city employee or official involved was *subjectively motivated* to take the retaliatory action *because of* Mr. Lozman's protected speech or conduct *(viz.,* filing a "Government in the Sunshine Act" suit against the City, and/or publicly criticizing the City's proposed marina redevelopment [7] project and/or speaking about perceived public corruption in Riviera Beach). To make this connection, it is sufficient to show that the protected speech or conduct was *a substantial motivating factor* for one or more of the alleged retaliatory acts. That is, the impermissible animus does not have to be the only motivating factor, but it must be a "substantial" one. A substantial motivating factor means a significant factor, *i.e.* one that played a substantial part in triggering the alleged retaliatory action.

If you find by a preponderance of the evidence that Mr. Lozman's protected speech and/or conduct was a motivating factor behind any one or more of the alleged retaliatory acts, the burden then shifts to the City to show that it would have taken the same action in the absence of protected conduct, in which case the City cannot be held liable.

In considering Mr. Lozman's First Amendment retaliation claim, it can be subdivided into four parts. I will discuss each of them individually.

(A) ADVERSE ACTIONS AT CITY COUNCIL MEETINGS

In the first subcategory or segment, Mr. Lozman claims that city officials retaliated against him is by interrupting him while he was speaking during public comment periods at city council meetings and cutting him off or directing his removal from the podium. In your deliberations on this segment of the First Amendment retaliation claim, you must make a factual determination on the official's motive. Mr. Lozman claims that the official had an impermissible animus to punish him for having exercised his First Amendment rights by opposing the marina project, or by speaking about perceived public corruption in Riviera Beach, or by filing a Government in the Sunshine Act lawsuit. The City, however, denies that the Chairperson of the City Council or any other city official had such a retaliatory motive, and [8] contends that the chairperson was simply enforcing normal procedure and rules of decorum during the public comment portions of the city council meetings.

The constitutionality of the City's rules of procedure and decorum is not at issue in this lawsuit.

I instruct you that the law permits a municipal government to impose restrictions on speech during the public comment period at city council meetings. For example, a city may limit the amount of time speakers receive to make their public comments. Also, a city may restrict the topic of the public comments to matters relevant to an agenda item or to matters relevant to Riviera Beach or actions that the city council should undertake or refrain from undertaking. A city, however, cannot engage in viewpoint discrimination, i.e., it cannot prohibit or limit public comment based on the speaker's view of a permissible topic.

If you find that a city official in this case was motivated by a simple desire to enforce its rules of procedure and decorum, and that the official was not subjectively motivated by a desire to punish or retaliate against Mr. Lozman for engaging in protected speech and conduct, then you should find no "retaliation," and your verdict on this segment of Mr. Lozman's First Amendment retaliation claim should be in favor of the City.

On the other hand, if you find the city official's conduct was motivated by a desire to retaliate against Mr. Lozman because of his protected speech or conduct, and that this motive was a substantial factor behind the official's decision(s) to stop or remove Mr. Lozman from the podium at one or more city council meetings, then you should find the element of "retaliation" satisfied and proceed to determine whether there is a basis for holding the City liable for that conduct under one of the theories of municipal liability on which I will separately instruct you in a moment.

[9]

(B) OTHER ALLEGED RETALIATORY ACTS

A second way that Mr. Lozman claims to have been retaliated against is that city employees engaged in various retaliatory acts of harassment against him during the course of his daily life at the marina. For example, Mr. Lozman contends that (a) Riviera Beach police officers harassed him for walking his dog without a muzzle; (b) a marina employee tried to run him over in a golf cart; (c) city employees cut off his electricity; (d) city employees followed him and took his photograph; and (e) Pierre Smith, a city employee, took photographs of Mr. Lozman inside his floating home.

In order to prevail on this particular segment of the plaintiff's First Amendment retaliation claim, Mr. Lozman must prove all four elements listed on page 5 of these instructions. I will discuss those elements further as they apply to this segment.

As instructed earlier, Mr. Lozman's speech in opposition to the city marina project, his comments about perceived corruption in Riviera Beach, and his filing of the Government in the Sunshine suit constituted protected speech and conduct under the First Amendment.

Also, as instructed earlier, a governmental official or employee "retaliates" against a citizen if the official or employee's actions would likely deter a person of ordinary firmness from exercising his First Amendment rights. So in assessing the element of "retaliation," in connection with this harassment segment of Mr. Lozman's First Amendment retalia-

tion claim, you shall consider whether any one or more of the alleged intentional acts of harassment would have this chilling effect on a person of ordinary firmness, *i.e.*, on a similarly situated reasonable person standing in Mr. Lozman's shoes.

[10] Finally, on the causation element, Mr. Lozman must show that his protected speech or conduct was a substantial motivating factor for any of the alleged intentional acts of retaliation in order to prove that he was retaliated against "because of" constitutionally protected activity.

If Mr. Lozman does not prove each of the elements listed on page 5 of these instructions as to each alleged act or incident, then he has not proven a violation of his First Amendment rights under this segment of his claim, and you should find in favor of the City on this segment.

On the other hand, if Mr. Lozman does prove each of the elements listed on page 5, then you should consider the court's instruction on municipal liability – a matter on which I will separately instruct you in a moment.

(C) ADMIRALTY ARREST OF FLOATING HOME

A third way that Mr. Lozman claims to have been retaliated against is by a city employee's initiation of an admiralty action against Mr. Lozman's floating home. Mr. Lozman claims that a city employee initiated the action with an impermissible animus, *i.e.*, to retaliate against or to punish him for having engaged in constitutionally protected speech or conduct. The City contends that its employee initiated the admiralty action because of legitimate concerns, such as

Mr. Lozman's failure to sign and comply with the approved dockage agreement.

To prove that he was retaliated against in violation of his First Amendment rights, Mr. Lozman must prove all four elements listed on page 5 of these instructions. I will discuss those elements further as they apply to this segment.

[11] As instructed earlier, Mr. Lozman's speech in opposition to the city marina project, his comments about perceived corruption in Riviera Beach, and his filing of the Government in Sunshine suit constituted protected speech and conduct under the First Amendment.

Also, as instructed earlier, a governmental official or employee "retaliates" against a citizen if the official or employee's actions would likely deter a person of ordinary firmness from exercising his First Amendment rights. So in assessing the element of "retaliation," in connection with this admiralty action segment of Mr. Lozman's First Amendment retaliation claim, you shall consider whether the employee's initiation of an admiralty action would have this chilling effect on a person of ordinary firmness, *i.e.*, on a similarly situated reasonable person standing in Mr. Lozman's shoes.

Also, as instructed earlier, it has been stipulated or agreed that the city employee who initiated the admiralty action acted under "color of law" and therefore this element has been satisfied.

Finally, on the causation element, Mr. Lozman must show that his protected speech or conduct was a substantial motivating factor for the City employee's

initiation of an admiralty action in order to prove that he was intentionally retaliated against "because of" constitutionally protected activity.

If Mr. Lozman does not prove each of the elements listed on page 5 of these instructions, then he has not proven a violation of his First Amendment rights under this segment of his claim, and you should find in favor of the City on this segment.

[12] On the other hand, if Mr. Lozman does prove each of the elements listed on page 5, then you should consider the court's instruction on municipal liability – a matter on which I will separately instruct you in a moment.

(D) FALSE ARREST AS "RETALIATION" UNDER FIRST AMENDMENT

A fourth way that Mr. Lozman claims to have been retaliated against was his arrest on November 15, 2006. In order to prove that he was retaliated against in violation of his First Amendment rights, Mr. Lozman must prove all of the four elements listed on page 5 of these instructions. In addition, he must prove that the arresting officer lacked probable cause to believe that Mr. Lozman had or was committing a crime.

In other words, to prove that he was retaliated against in violation of his First Amendment rights, Mr. Lozman must show by a preponderance of the evidence:

First: That he engaged in speech or conduct protected by the First Amendment;

Second: That a Riviera Beach police officer arrested him and the officer was motivat-

ed to take this action because he had an impermissible animus to retaliate against Mr. Lozman for engaging in constitutionally protected speech or conduct;

Third: That the arresting officer acted "under color" of state law;

Fourth: That the arresting officer lacked probable cause to believe that Mr. Lozman had or was committing a crime.

On the first element, I have already instructed you, Mr. Lozman engaged in constitutionally protected speech and conduct when he criticized the City's proposed marina redevelopment plan, voiced concern about perceived public corruption in Riviera Beach, and filed his Government in the Sunshine Act suit against the City. Therefore, the first element has been established.

[13] On the second element, as I have previously instructed you, a governmental official or employee "retaliates" against a citizen if the official or employee's actions would likely deter a similarly situated, reasonable person in the plaintiff's position from exercising his First Amendment rights.

On the third element, the parties have stipulated or agreed that Officer Aguirre, the arresting officer involved in the November 15, 2006 arrest, acted "under color" of state law. Therefore, the third element has been established.

As for the fourth element, it is undisputed that Officer Aguirre arrested Mr. Lozman at the November 15, 2006 city council meeting when the officer

placed handcuffs on Mr. Lozman. The remaining question is whether Officer Aguirre had "probable cause" to conclude that Mr. Lozman had committed or was committing a crime. An officer has probable cause to arrest a person without a warrant whenever the facts and circumstances within the officer's knowledge, based on reasonably trustworthy information, would cause a reasonable officer to believe that a person has committed, is committing, or is about to commit a crime. The standard for this inquiry is an objective standard – what conclusion would have been reached by a reasonable police officer viewing all of the existing facts and circumstances.

Under Florida law, any person who "willfully interrupts or disturbs any . . . assembly of people met . . . for any lawful purpose" commits the crime of disturbing a lawful assembly. I instruct you that a city council meeting is a "lawful assembly" within the meaning of this statute.

For a police officer to have probable cause to arrest a person for the crime of disturbing a lawful assembly, the officer must have reasonable grounds to believe that:

[14]

(1) That an individual was acting with the intention that his behavior impede the successful functioning of the assembly, or with reckless disregard of the effect of his behavior;

(2) That he individual's acts were such that a reasonable person would expect them to be disruptive; and

(3) That the individual's acts did, in fact, significantly disrupt the assembly.

If Mr. Lozman does not prove each of the elements listed on page 5 of these instructions, plus a lack of probable cause for his arrest, then he has not proven a violation of his First Amendment rights under this segment of his claim, and you should find a favor of the City on this segment.

On the other hand, if Mr. Lozman does prove each of the elements listed on page 5 plus a lack of probable cause, then you should consider the court's instruction on municipal liability – a matter on which I will separately instruct you in a moment.

* * *

RECORD AND BRIEFS

FILED
OCT 11 2017
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SUPREME COURT, U.S.

No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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Continued from front cover

QUESTIONS PRESENTED

1. Officer Francisco Aguirre, a City of Riviera Beach police officer, arrested Fane Lozman based on his independent determination that he had probable cause to do so. Lozman sued the City, under 42 U.S.C. § 1983, arguing that the arrest violated his constitutional rights. In light of the rule that municipalities may not be held vicariously liable under § 1983 for their employees' conduct, *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690, 694 (1978), does Lozman's claim fail as a matter of law?

2. In *Hartman v. Moore*, 547 U.S. 250 (2005), this Court held that probable cause defeats a First Amendment retaliatory-prosecution claim as a matter of law. Does probable cause likewise defeat a First Amendment retaliatory-arrest claim?

PARTIES TO THE PROCEEDING

The plaintiff in the District Court was Fane Lozman. The defendants were:

1. The City of Riviera Beach;
2. Michael Brown;
3. George Carter;
4. Judy Davis;
5. Norma Duncombe;
6. Bruce Guyton;
7. Ann Iles;
8. Vanessa Lee;
9. Dawn Pardo;
10. Riviera Beach Community Redevelopment Agency;
11. Gloria Shuttlesworth;
12. Cedrick Thomas; and
13. Elizabeth Wade.

The only parties to the Eleventh Circuit appeal below, and to this proceeding in the Supreme Court of the United States, are Fane Lozman and the City of Riviera Beach.

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INTRODUCTION

Fane Lozman's petition asks whether probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law. To answer that question, the Court would have to overlook Lozman's failure to raise it in the Eleventh Circuit. The Court would also have to overlook an alternative basis for affirming the Eleventh Circuit—one that rests on statutory grounds, and that would make it unnecessary to address the constitutional question Lozman presents. And it would have to do all of this in a case where the petitioner's rights were not even violated, because probable cause *does* defeat a First Amendment retaliatory-arrest claim as a matter of law. The Court should deny Lozman's petition for a writ of certiorari.

STATEMENT

1. Fane Lozman moved to the City of Riviera Beach in 2006. Petn. 16a. He has spent much of the time since protesting, and filing lawsuits in opposition to, local policies and local officials.

Lozman is a particularly outspoken critic of the former mayor and members of the City Council. He began regularly attending the City Council's bimonthly meetings in 2006. *See* ECF No. 820, *Lozman v. City of Riviera Beach*, No. 08-cv-80134 (S.D. Fla.) ("Dkt.") (videos of meetings introduced as exhibits at trial). He often exercised his right to speak during the portion of those meetings dedicated to public comment. The Council permitted him to do so, despite his using the time to make accusatory, often *ad hominem* harangues. *Id.* Lozman's presentations threatened local

officials with jail time based on vague accusations of "corruption." *See, e.g.*, Dkt. 820, Ex. 5 (July 19, 2006 meeting). In a September 2006 address, Lozman charged the mayor's brother with having bitten someone, and asked whether the mayor would require his brother to be muzzled. *Id.*, Ex. 7 (September 6, 2006 meeting). And on another occasion, he accused the mayor of having "spew[ed] ... racist bile" toward then-Governor Jeb Bush. *Id.*, Ex. 5. In each instance, however, the Council permitted Lozman to make his statements during the allotted time.

Lozman, as he usually did, attended the Council's November 15, 2006 meeting. And Lozman, as he usually did, chose to address the Council during the time for public comment. But rather than focusing on his usual targets—the mayor and the City Council—Lozman began addressing corruption on the part of Palm Beach County officials. *See Activist Arrested at Riviera Beach Council Meeting*, YOUTUBE (Sept. 15, 2009), https://tinyurl.com/lbj5qqj. The City of Riviera Beach is located within Palm Beach County, but the County and the City are distinct entities. Thus, Lozman's address had nothing to do with City business. (Lozman's petition obscures this, by describing his speech as relating to "local government corruption in Palm Beach County," without specifying *whose* corruption. Petn. 5.)

This caused Councilmember Elizabeth Wade to speak up. She did not ask Lozman to stop speaking altogether, but she did attempt to redirect him, instructing that he would not be permitted to "stand up and go through that kind of ...." Before

she could finish, Lozman interrupted her by exclaiming "Yes, I will." Wade responded that he would not, and, when Lozman resumed his discussion of corruption by County officials, Wade called for an "officer." *See Activist Arrested at Riviera Beach Council Meeting*, https://tinyurl.com/lbj5qqj.

At this point, Officer Francisco Aguirre—a rookie policeman who had never heard of Lozman, never worked at or even attended a Council meeting, and never met the councilmembers—approached Lozman and quietly asked him to come outside. Lozman refused ("I'm not finished"). Officer Aguirre asked again, stating: "You're going to be arrested if you don't walk outside." Lozman responded that he was "not walking outside," because he had not "finished [his] comments." At this point, Councilmember Wade interjected that, if Lozman would not walk outside, Officer Aguirre should "carry him out." Even before Wade finished making that request, Officer Aguirre reached for his handcuffs. He placed Lozman under arrest, and escorted him out of the meeting. *Id.*; *see also* Petn. 4a.

Despite Wade's request, the decision to arrest Lozman was Officer Aguirre's to make. Under an ordinance that was then in effect, the City Council Chairperson was assigned responsibility for "preserv[ing] order and decorum within the Chambers." Dkt. 805 at 60. But, as confirmed by uncontroverted evidence from two separate witnesses at trial, neither the Chairperson nor the Council had authority to order a speaker's arrest. Instead, police officers alone had discretion to

decide whether to make an arrest, and could do so only upon independently determining that there was probable cause to do so. *See* Dkt. 770, Day 3 Tr. 174:1–6. 219:9–15; Dkt. 772, Day 5 Tr. 11:13–22. In any event, the council member who called for Officer Aguirre's assistance—Councilmember Wade—was neither the Council's Chairperson nor its Vice Chairperson. Dkt. 770, Day 3 Tr. 14:5–8, 224:14–17. So she would have lacked authority to order Lozman's arrest even if there had been an ordinance authorizing the Chairperson to issue such an order.

2. The first round of litigation over this incident began in Florida state court, when the City sued to evict Lozman. In response, Lozman raised a slew of counterclaims, including one accusing the City of violating his First Amendment rights by arresting him at the November 15 meeting. As the case progressed, "the state court dismissed" this counterclaim "without prejudice based upon an agreement between counsel." *Lozman v. City of Riviera Beach (Lozman I)*, 713 F.3d 1066, 1070 (11th Cir. 2013).

While the remainder of Lozman's counterclaims remained pending in the state action, Lozman filed this federal suit against the City and numerous others. Once the state suit wrapped up, the District Court *sua sponte* ruled that Lozman's federal suit was effectively an appeal of the state court's earlier judgment, and dismissed for lack of jurisdiction under the *Rooker-Feldman* doctrine. But the Eleventh Circuit reversed that ruling, and remanded the case to the District Court for a jury trial. *Lozman I*, 713 F.3d at 1073–74.

The City and Lozman disputed numerous legal issues in the District Court. The City, for example, argued that it was entitled to summary judgment under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690, 694 (1978), which held that municipalities are not vicariously liable in § 1983 suits for their employees' conduct. *See* Dkt. 383 at 2–11. And over the course of the trial, the parties presented evidence and made arguments on the many issues underlying Lozman's claims. In the end, the case went to the jury, which was instructed that Lozman, to succeed on his First Amendment retaliatory-arrest claim, had to prove that Office Aguirre lacked probable cause to arrest him. Ultimately, the jury returned a verdict for the City. *See* Dkt. 786, Day 19 Tr. 56:10–58:5.

3. Lozman retained appellate counsel and appealed to the Eleventh Circuit. There, he argued that he was entitled to a new trial because "the jury's verdict finding probable cause to arrest ... was against the great weight of the evidence." Petn. 7a. (Lozman also challenged two jury instructions, but neither is relevant to the question presented.) Lozman failed to dispute—and thus implicitly conceded—that he was obligated to prove a lack of probable cause as an element of his First Amendment retaliatory-arrest claim.

The City responded to each of Lozman's arguments for reversal. But it also pointed to an alternative basis for affirmance: As it did in the District Court, the City argued that Lozman's retaliatory-arrest claim failed as a matter of law because he was attempting to hold the City

vicariously liable for the conduct of its employees, which is impermissible under § 1983. *See* Ans. Br. of Appellee City of Riviera Beach 28–32, *Lozman*, 713 F.3d 1066 (No. 15-10550).

The Eleventh Circuit affirmed the District Court. In addressing Lozman's new-trial argument, the Eleventh Circuit followed Lozman's lead by relying unquestioningly on circuit precedent requiring retaliatory-arrest plaintiffs to prove lack of probable cause. *See* Petn. 7a (citing *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002)). It treated the issue as undisputed, and nowhere noted any attempt by Lozman to preserve the issue for further appeal. So rather than grappling with this issue—or with the alternative ground for affirmance proposed by the City—the Eleventh Circuit found that the evidence supported the jury's no-probable-cause finding, rejected Lozman's jury-instruction arguments, and affirmed. Petn. 9a, 14a.

Lozman's petition for certiorari followed.

REASONS FOR DENYING CERTIORARI

This Court should deny Lozman's petition for a writ of certiorari for three reasons. First, Lozman waived his argument by failing to make it in the Eleventh Circuit. Second, because Lozman seeks to hold the City liable for its employees' conduct, and because § 1983 does not permit liability in these circumstances, *Monell*, 436 U.S. at 690, 694, there is an alternative statutory basis for resolving this case. The Court should therefore decline to resolve the constitutional question that Lozman's petition presents. Finally, Lozman was properly denied

relief because probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law.

I. LOZMAN WAIVED HIS ARGUMENT BY FAILING TO RAISE IT IN THE ELEVENTH CIRCUIT.

Lozman's petition for certiorari presents a single question: "Does the existence of probable cause defeat a First Amendment retaliatory-arrest claim as a matter of law?" Petn. i. He argues that the answer is "no." But he never made that argument before the Eleventh Circuit. To the contrary, he assumed that lack of probable cause *was* an element of his claim: He accepted without question jury instructions that required the jurors to find the absence of probable cause, and he argued that there was insufficient evidence to support the jury's probable cause finding. *See* Opening Br. of Appellant 23–34, *Lozman*, 713 F.3d 1066 (No. 15-10550). Because Lozman's "argument was not raised below, it is waived." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *see also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210 (2015) (party waived argument by failing to raise it in the Court of Appeals); *United States v. Jones*, 565 U.S. 400, 413 (2012) (argument neither raised in nor addressed by the Court of Appeals was "forfeited").

It is true that circuit precedent foreclosed Lozman's argument. *See Dahl*, 312 F.3d at 1236. It is also irrelevant. The Eleventh Circuit can and does overrule circuit precedent, *see, e.g.*, *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1080 (11th Cir. 2017) (en banc),

and nothing prevented Lozman from asking it to do so. Even if he thought the argument hopeless—and surely it is not hopeless to ask a court to reconsider precedent implicated in a circuit split—he could have expressly preserved the argument for further review, as others have done before petitioning this Court for a writ of certiorari. *See, e.g.*, *United States v. Voisine*, 778 F.3d 176, 186 (1st Cir. 2015), *cert. granted in part*, 136 S. Ct. 386 (2015), *aff'd*, 136 S. Ct. 2272 (2016) (party preserved for review before the Supreme Court an argument foreclosed by circuit precedent); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 2545 (2016) (granting certiorari to review argument that petitioner conceded was foreclosed by precedent, but that it nonetheless preserved).

The circumstances of this case make forgiving Lozman's waiver especially hard to justify. As this brief explains below in Section II, Lozman's retaliatory-arrest claim fails as a matter of law on statutory grounds unrelated to the question presented. The Eleventh Circuit did not address this alternative basis for affirmance, even though the City briefed it. But had Lozman raised his constitutional argument, the Eleventh Circuit might have resolved the case on that alternative statutory ground. The City, the Eleventh Circuit, and the District Court should not have to further litigate a case that might well be over had Lozman raised the question presented at some point before seeking a writ of certiorari.

II. LOZMAN'S RETALIATORY-ARREST CLAIM FAILS AS A MATTER OF LAW, REGARDLESS OF THE ANSWER TO THE QUESTION PRESENTED.

According to Lozman, this is an "ideal vehicle" for resolving the question presented because municipalities such as the City are ineligible for qualified immunity. Petn. 18–19 (citing *Owen v. City of Independence*, 445 U.S. 622, 657 (1980)). This, Lozman says, means the Court will reach the question presented, unlike in *Reichle v. Howards*, 566 U.S. 658, 670 (2012), where the Court granted certiorari to address the same question presented here but ultimately reversed on qualified-immunity grounds.

This vehicle argument overlooks an alternative, statutory basis for affirming the Eleventh Circuit. To be sure, municipalities are ineligible for qualified immunity in § 1983 cases. *Owen*, 445 U.S. 622 at 657. But a distinct body of law protects them from liability. Under *Monell*, municipalities may not be held vicariously liable in § 1983 cases for their employees' conduct. 436 U.S. at 690. Rather, a municipality may be held liable under § 1983 only when its own "policy or custom ... inflicts the injury" for which relief is sought. *Id.* at 694.

Here, Lozman's arrest was caused not by the City's own policies, but rather by the independent decisions of a City employee. His § 1983 claim against the City thus fails as a matter of law, *without regard* to whether the arrest violated his constitutional rights. This means that Lozman's

case is no better a vehicle for resolving the question presented than was *Reichle*. It also means that resolving the question presented requires overriding this Court's "usual practice" of avoiding "the unnecessary resolution of constitutional questions." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009).

A. Section 1983 imposes liability on "[e]very *person* who, under color of" state law, "subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (emphasis added). The word "person" includes municipalities and local governments, so they can be sued under § 1983. *Monell*, 436 U.S. at 694.

Municipalities are not, however, vicariously liable for the tortious conduct of their employees. This follows from § 1983's legislative history, *id.* at 690, and its text, which imposes liability only for those deprivations of rights to which citizens are "*subject[ed]*, or *cause[d]* to be subjected," by the "person" being sued. 42 U.S.C. § 1983 (emphasis added); *Monell*, 436 U.S. at 691. Because § 1983 is keyed to the conduct of the "person" being sued, municipalities "are responsible only for 'their *own* illegal acts.'" *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986)). That is, "[p]laintiffs who seek to impose liability on local governments under § 1983 must prove that 'action pursuant to official municipal policy' caused their injury." *Id.* (quoting *Monell*, 436 U.S. at 691.)

"Official municipal policy includes the decisions of a government's lawmakers," along with "practices so persistent and widespread as to practically have the force of law." *Id.* at 61. It also includes "the acts of its policymaking officials." *Id.* That is, a municipality may be liable for actions taken by someone with "final policymaking authority ... concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). Whether an official has such authority is a question of law. So, in a § 1983 case, a court is required to identify, under state law, those officials or governmental bodies with final policymaking authority. *McMillian v. Monroe Cty.*, 520 U.S. 781, 786 (1997).

B. Lozman says the City violated his First Amendment rights when Officer Aguirre arrested him during his address to the City Council. Whether that alleged violation can be attributed to the City depends on whether it was performed pursuant to official municipal policy.

It was not. No written policy or informal custom required Officer Aguirre to arrest Lozman based on Wade's request to have Lozman removed. Nor was Wade a "final policymaking authority" concerning the question whether to perform an arrest. *Jett*, 491 U.S. at 737. Rather—as established by the uncontroverted testimony of two witnesses, including Officer Aguirre—officers *cannot* take orders from councilmembers regarding whom to arrest, and may perform an arrest only after independently deciding to do so. *See* Dkt. 770, Day 3 Tr. 174:1–6, 219:9–15; Dkt. 722, Day 5 Tr. 11:13–

22. To be sure, a city ordinance empowered the Council Chairperson to "preserve order and decorum within the Chambers." Dkt. 805 at 60. But there is no evidence that this included authority to order an arrest. And in any event, Wade was neither the Chair nor the Vice Chair.

The decision to arrest Lozman came not from "the policymaking level of government," but rather from a single "police officer" alleged to have "made an illegal arrest." *Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011). Officer Aguirre's independent decision to perform a single arrest does not constitute "official municipal policy," and so is not attributable to the City. *Id.* While Officer Aguirre had final *decisionmaking* authority regarding whether to arrest Lozman at the November 2006 meeting, he lacked any authority to set official municipal arrest policy. *See Valle v. City of Houston*, 613 F.3d 536, 543–44 (5th Cir. 2010) (drawing the same distinction in holding that municipality could not be held liable for officer's discretionary decision that resulted in an allegedly illegal search and seizure). Lozman's First Amendment retaliatory-arrest claim therefore fails as a matter of law, *without regard* to whether there was probable cause to arrest him.

C. "'[I]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" *United States v. Resendiz-Ponce*, 549 U.S. 102, 104 (2007) (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). Here, the Eleventh Circuit can be affirmed on statutory

grounds without reaching the First Amendment question that Lozman's petition presents.

This case does not present circumstances that would justify deviating from the "usual practice" of avoiding unnecessary constitutional rulings. *Nw. Austin*, 557 U.S. at 197. It has been more than five years since this Court decided *Reichle* without resolving the question presented by Lozman's petition. 566 U.S. at 670 (reversing on qualified-immunity grounds). Nothing in the five years since *Reichle* suggests this circuit split is particularly in need of Supreme Court resolution. It follows that the Court ought not reach the question presented.

III. LOZMAN IS NOT ENTITLED TO RELIEF BECAUSE LACK OF PROBABLE CAUSE IS AN ELEMENT OF A FIRST AMENDMENT RETALIATORY-ARREST CLAIM.

Below, the Eleventh Circuit recognized that probable cause for an arrest defeats a retaliatory-arrest claim as a matter of law. Petn. 7a–8a. Lozman argues that the burden-shifting framework announced in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), should apply to First Amendment retaliatory-arrest claims. This Court created the *Mt. Healthy* framework for cases in which public employees claim to have been fired (or never hired) for exercising their First Amendment rights. It has three steps: *First*, the plaintiff must show "that his conduct was constitutionally protected." *Id.* at 287. *Second*, he must show that his protected conduct was a "motivating factor" in the employer's adverse employment decision. *Finally*, if the plaintiff

makes both of these showings, the burden shifts to the government employer to prove "by a preponderance of the evidence that it would have reached the same decision ... even in the absence of protected conduct." *Id.*

Applied to the retaliatory-arrest context, the *Mt. Healthy* framework would mean that officers violate the First Amendment whenever they make an arrest that they would not have made but for the arrestee's protected speech. The question presented, therefore, boils down to whether the First Amendment forbids such arrests. This Court's case law, along with historical and practical considerations, confirm that it does not.

A. This Court's Precedent Supports Requiring Retaliatory-Arrest Plaintiffs To Prove Lack of Probable Cause.

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that plaintiffs alleging retaliatory *prosecution* in violation of the First Amendment must plead and prove lack of probable cause. *Id.* at 256. It gave two primary reasons for doing so, both of which apply to the retaliatory-arrest context.

First, the Court noted that causation will always be at issue in a retaliatory-prosecution case, because the plaintiff will have to make (at least) a *prima facie* case that retaliatory animus caused him to be prosecuted. Evidence regarding probable cause is "highly valuable" to proving or disproving "retaliatory causation." *Id.* at 261. It is also always readily available. *Id.* Thus, the no-probable-cause requirement imposed little cost, since it obligated the plaintiff only to litigate a

highly relevant fact that is certain to be litigated anyway. *Id.*

The same logic applies to retaliatory arrests: "Like retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case." *Reichle*, 566 U.S. at 668. And this evidence is similarly critical, "given that retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." *Id.* While "[a]n officer might bear animus toward the content of a suspect's speech," he may also "decide to arrest the suspect because his speech provides evidence of a crime or suggests a potential threat." *Id.*; *see also infra* 17–19. Evidence of probable cause is readily available and critically important to determining whether the arrest really was retaliatory. *Reichle*, 566 U.S. at 668.

The second reason *Hartman* gave for recognizing a no-probable-cause element is "that the requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases." 547 U.S. at 261. The complexity stems from the fact that prosecutors are absolutely immune from suit, and are subject to the "presumption of prosecutorial regularity," under which they are presumed to discharge their duties in good faith. Because of all this, "the defendant" in a retaliatory-prosecution case "will be a nonprosecutor ... who may have influenced the prosecutorial decision but did not himself make it." *Id.* at 262. As a result, retaliatory-prosecution plaintiffs must prove "that

the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging." *Id.* Requiring plaintiffs to prove a lack of probable cause helps "to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity." *Id.* at 263.

The no-probable-cause element serves the same function in the retaliatory-arrest context. To be sure, the causal chain in a retaliatory-arrest case *may* involve the conduct of a single person, since the arresting officer and the officer with retaliatory animus may be one and the same. Often, however, the chain will often be a good deal more complicated; the arresting officer may have no animus whatsoever, and may decide to perform an arrest while simultaneously being urged to do so by someone else (for example, a supervisor or a fellow officer). Indeed, that is precisely what Lozman alleges happened here: He says Officer Aguirre performed the arrest at the urging of Councilmember Wade, and that *Wade* is the one who wished to retaliate against Lozman. The very same problem that arises in the retaliatory-prosecution case—the need to bridge the gap between one person's animus and another's conduct—arose here, and will arise often in arrest situations. As in the retaliatory-prosecution context, lack of probable cause helps bridge the causal gap between one person's animus and another's action, and thus helps justify the

conclusion that retaliatory animus really did cause the plaintiff's arrest.

B. A Rule Prohibiting Officers from Making Arrests Deviates from Longstanding Practice.

The Eleventh Circuit's no-probable-cause requirement is further supported by longstanding practice and practical concerns. If Lozman is right that the *Mt. Healthy* framework applies to First Amendment retaliatory-arrest claims, then everyday, uncontroversial policing tactics are unconstitutional. Speech protected by the First Amendment often "provides evidence of a crime or suggests a potential threat." *Reichle*, 566 U.S. at 668. In some circumstances, protected speech might even create probable cause for an arrest. In *Wayte v. United States*, 470 U.S. 598 (1985), for example, petitioner David Wayte "wrote several letters to Government officials, including the President, stating that he had not registered" for the Selective Service "and did not intend to do so." *Id.* at 601. Wayte indisputably had a right to send these letters. Nonetheless, this Court rejected his First Amendment challenge to his conviction. Wayte's letters "provided strong, perhaps conclusive evidence of the nonregistrant's intent not to comply—one of the elements of the offense" of failing to register for the draft. *Id.* at 612–13. And if Wayte were right that the Government had to prove "that it would have prosecuted him without his letter," "any criminal [could] obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to 'protest' the law." *Id.* at 614.

Even when protected speech does not create probable cause for an arrest, it is frequently relevant to the decision whether to arrest a lawbreaker. Officers cannot enforce every violation of every law; they must "use some discretion in deciding when and where" to do so. *City of Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999). Often, a potential arrestee's protected speech will inform the exercise of that discretion.

The facts of *Reichle* illustrate the point. There, Secret Service agents arrested Steven Howards after he touched Vice President Dick Cheney on the shoulder during an exchange at a Colorado mall. 566 U.S. at 661. Howards' touching the Vice President gave them probable cause to arrest him for assault. But the real reason the agents performed the arrest likely had nothing to do with the assault; rather, they concluded that Howards posed a danger based on some combination of three statements he made, each protected by the First Amendment: *First*, Howards explained on a phone call, made before meeting Cheney, that he would "ask [the Vice President] how many kids he's killed today." *Id.* at 660. *Second*, Howards told Cheney that "his 'policies in Iraq [were] disgusting.'" *Id.* at 661. *Finally*, when confronted by a Secret Service agent about his having touched Cheney, Howards stated that the Service should "have [the Vice President] avoid public places" if it did not "want other people sharing their opinions." *Id.* The First Amendment entitled Howards to make each of these statements. But the same statements indicated a hostility toward the Vice President that, at least when coupled with the mall's lack of

security, reasonably led the agents to conclude that arresting Howards was necessary to protect the Vice President and those in his vicinity. As a result, they arrested Howards for conduct that surely would not have led to his arrest but for his protected speech.

More mundane examples illustrate just how common (and legitimate) such considerations are. For example, an officer might consider whether a drunk is making aggressive statements—and thus is more likely to be a threat to public safety—in deciding to perform an arrest for public intoxication or an open-container violation. *See, e.g.*, *Martin v. City of Oklahoma City*, 180 F. Supp. 3d 978, 984 (W.D. Okla. 2016); *Valdez v. City of San Jose*, No. C 09-0176 CW, 2013 WL 752498, at *2 (N.D. Cal. Feb. 27, 2013); *Legan v. State*, 889 N.E.2d 928 (Ind. Ct. App. 2008). That's good policing, not a constitutional tort.

It is thus easy to imagine myriad circumstances in which officers perform arrests that they would not have performed but for the arrestee's speech. Under Lozman's proposed rule, every one of them would be unconstitutional. He is therefore wrong in arguing that "[t]he *Mt. Healthy* framework is well-suited to retaliatory-arrest claims." Petn. 23. "[P]olice officers are often forced to make split-second judgments," and to do so "in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 397 (1989). Their ability to do so would be greatly impaired by subjecting them to *personal liability* for relying on potential arrestees' speech.

Indeed, the *Mt. Healthy* framework would not just impair police work; it would make it more dangerous than it already is. If this Court were to adopt the *Mt. Healthy* framework, arrestees would have an incentive to verbally abuse officers when facing the possibility of arrest, as their doing so would expose the arresting officer to the threat of liability and so decrease the odds of an arrest. In addition to needlessly deterring legitimate arrests, giving citizens greater incentive to exhibit hostility toward the police will create more dangerous (and perhaps deadly) situations. Just as the First Amendment "confers no ... immunity from prosecution" on those who report themselves to "'protest' the law," *Wayte*, 470 U.S. at 614, it should confer no immunity from arrest on those who antagonize the police and their fellow citizens.

Finally, adopting Lozman's rule would create a federal case almost every time an officer arrests someone, as there is almost always *some* verbal interaction between officer and arrestee. It is no answer to say that there have been relatively few retaliatory-arrest suits to date. A Supreme Court decision in Lozman's favor would receive exponentially more attention and encourage exponentially more copycat suits than circuit-court decisions doing the same. More critically, adopting Lozman's rule would destroy the qualified-immunity defense now available in many situations because it would clearly establish the law. With that, the odds of prevailing—and the number of claims filed—will increase dramatically.

C. The Equal Protection Clause Has No Bearing on This Case.

In *Whren v. United States*, 517 U.S. 806, 813 (1996), this Court explained that an arrest motivated by race would violate the Equal Protection Clause *even if* it were supported by probable cause. This recognition does not support Lozman's theory. Petn. 33. The Equal Protection Clause exists to prohibit government actors from making otherwise-valid enforcement decisions based on race and other irrelevant considerations—that is, "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination." *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918). As a result, Equal Protection challenges are often necessarily subjective; whether a violation occurred comes down to what motivated the government actor. To prevent the Equal Protection Clause from accomplishing nothing with respect to the arbitrary enforcement decisions it is supposed to prohibit, probable cause is neither an element of nor a defense to an Equal Protection challenge.

The First Amendment is different. Protecting against retaliatory arrests is but a small fraction of what the First Amendment does. *Hartman* recognized as much by requiring retaliatory-*prosecution* plaintiffs to prove lack of probable cause. *See* 547 U.S. at 256, 265–66. Retaliatory-*arrest* plaintiffs are no different. To be sure, an arrest motivated by protected speech may constitute an arbitrary enforcement decision that gives rise to an Equal Protection claim. But

Lozman has not made such an argument, and so the Court need not address the issue here.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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RECORD AND BRIEFS

No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The City does not deny the "widespread instability in the law" regarding whether the existence of probable cause categorically defeats a First Amendment retaliation claim when the retaliation is accomplished through an arrest, *Dukore v. District of Columbia*, 799 F.3d 1137, 1145 (D.C. Cir. 2015). *See* BIO 8, 13 (acknowledging the circuit split). The conflict among the circuits has deepened since this Court reserved the question in *Reichle v. Howards*, 566 U.S. 658 (2012). *See* Pet. 10-16. Nor does the City challenge petitioner's argument that the issue has special importance today. *See id.* 16-18; Br. of Amicus Curiae First Amendment Foundation 7-14 (providing numerous recent examples, including ones involving citizens being targeted for criticizing the government); Br. of Amicus Curiae Institute for Justice 5-6 (discussing the problem the no-probable-cause rule poses for contemporary critics of local governments).

The City nevertheless argues that certiorari should be denied because this case suffers from two vehicle defects. First, it asserts that the question presented is not properly before this Court because petitioner did not press it in the Eleventh Circuit. BIO 7-8. Second, it proffers "an alternative, statutory basis" for affirmance, *id.* 9, arguing that petitioner cannot meet the requirements for municipal liability under 42 U.S.C. § 1983. *See id.* 9-13. The City is wrong on both counts.

As for the City's merits arguments, they are both unpersuasive and inconsistent. In any event, given that the "circuits are split," *Thayer v. Chiczewski*, 705

F.3d 237, 253 (7th Cir. 2012), those arguments provide no reason to deny review.

I. Because the Court of Appeals squarely passed upon the question presented, the City's waiver argument fails.

The City claims that petitioner cannot raise the question presented in this Court because, in the face of binding circuit precedent, he did not include the issue in his briefing to the Eleventh Circuit. *See* BIO 7-8. Not so.

This Court has repeatedly held that it can grant review with respect to "[a]ny issue 'pressed or passed upon below' by a federal court." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 530-31 (2002) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). "[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Williams*, 504 U.S. at 41. And this Court has also rejected the City's suggestion, *see* BIO 7-8, that a party must "demand overruling of a squarely applicable" circuit precedent before this Court can "grant[] certiorari upon an issue decided by a lower court," *Williams*, 504 U.S. at 44. Accordingly, when a court of appeals has addressed an issue, this Court can grant review "even if" the issue was not "raised by petitioner below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also Citizens United v. FEC*, 558 U.S. 310, 330 (2010).

Here, there is no doubt that the Court of Appeals "expressly ruled on the question, in an appropriate exercise of its appellate jurisdiction." *Williams*, 504 U.S. at 42-43 (citation omitted). In fact, the Eleventh Circuit's ruling on the question is indispensable to its

decision. Petitioner claimed that the City Council decided to retaliate against him for exercising his First Amendment rights, and that Councilperson Wade later executed that decision "by summoning Officer Aguirre to the podium and then directing Officer Aguirre to 'carry [Lozman] out.'" Pet. App. 10a. The Court of Appeals found that petitioner had offered a "compelling" argument that the district court "erred by instructing the jury" to look at Officer Aguirre's state of mind rather than the Councilmembers'. *Id.* It nonetheless affirmed the judgment because, under binding circuit precedent, "probable cause defeats Lozman's First Amendment retaliatory arrest claim as a matter of law." *Id.* at 10a-11a (citing *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002)).

This case is a textbook example of the principle articulated in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), that granting review is appropriate when "the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law," *id.* at 1099 n.8 (internal citations and quotation marks omitted). Especially given the other ways this case is an ideal vehicle, Pet. 18-21, this Court should grant review.[1]

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[1] The City offers the far-fetched claim that, had petitioner pressed the probable cause issue on direct appeal, the Eleventh Circuit might have affirmed on alternative grounds. *See* BIO 8. A circuit panel cannot ignore binding circuit precedent, and *Dahl* is so directly on point that the panel needed to go no further. It is especially implausible that the Eleventh Circuit would have affirmed on the City's purported "alternative." *See infra* Part II.

II. The City's assertion that it cannot be held responsible for petitioner's arrest provides no basis for denying review.

The City's second vehicle argument is that the question presented has no legal consequence to petitioner because he cannot, "as a matter of law," establish municipal liability. BIO 9. According to the City, this is because "[t]he decision to arrest Lozman came not from 'the policymaking level of government,' but rather from a single 'police officer' alleged to have 'made an illegal arrest.'" *Id.* 12 (quoting *Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011)).

The City admits that "[t]he Eleventh Circuit did not address this alternative basis for affirmance." BIO 8. Consistent with this Court's role as "a court of review, not of first view," it should simply decide the question presented, and leave this issue to be "decide[d] on remand." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1949 (2015) (citation omitted).

This is especially true because, contrary to the City's framing, whether the arrest decision was caused by city policymakers or the "independent decisions" of a line-level "City employee," BIO 9, is actually a question of fact that was hotly contested and has not yet been resolved.

The district court denied the City's motion for summary judgment expressly because, on "the issue of the City's *Monell* liability," Pet. App. 30a, it found "sufficient circumstantial evidence" to make it a "jury question" whether the alleged retaliatory actions were "taken with the support of at least three [of the five]

council persons," *id.* 32a, who "harbored illicit motivation to punish and deter Lozman based on his exercise of free speech and petition of government," *id.* 31a.

At trial, petitioner presented evidence that Councilperson Wade proposed to "intimidate" him in response to his exercising his First Amendment rights, Pet. App. 3a; that a second councilmember agreed that "what Ms. Wade says is right. We do have to beat this thing, and whatever it takes, I think we should do it," *id.*; and that when a third councilmember asked whether "we have a consensus of what Ms. Wade is saying," the fourth and fifth councilmembers each said "Okay." ECF 805, at 45.[2] Petitioner also showed a videotape of the council meeting at which he was arrested. That videotape, which this Court should view for itself, https://tinyurl.com/lbj5qqj (at 0:30), shows Wade temporarily chairing the session, *see* Tr. 9-10 (11/18/2014), ECF 771, "summon[ing]" Officer Aguirre within seconds of petitioner's beginning to speak, and, when petitioner insisted on continuing to speak, directing Aguirre to "carry him out," Pet. App. 4a.

At the jury instruction conference, petitioner pressed his theory that Councilperson Wade "directed" the arrest. Tr. 191 (12/11/2014), ECF 783; *see also* Tr. 10 (12/12/2014), ECF 784. The district court recognized that "the facts of this case are susceptible to analysis that the officer, a young officer, present in a city council meeting, hearing a councilwoman—and frankly, a councilwoman like Ms. Wade, who is a very persuasive person just simply followed her direction."

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[2] This document contains the transcript of the closed-door City Council meeting. *See* Pet. 5 n.2.

Tr. 14 (12/12/2014), ECF 784. But the district court nonetheless instructed the jury that it should "consider the court's instruction on municipal liability," Pet. App. 62a, only if it first found both that Officer Aguirre "had an impermissible animus" against petitioner, *id.* 60a, and that there was "a lack of probable cause" for the arrest, *id.* 62a.

Because the jury found probable cause, it never got to the municipal liability instruction, which is where it would have determined whether the decision to arrest petitioner was either "directed, authorized, or agreed to" by a majority of the City Council, Jury Instructions at 20-21, ECF 732, or "ratified" by it, *id.* at 21. Thus, although "whether Wade ordered the arrest or the officer made his own decision to arrest Lozman was a factual question for the jury," the instruction, "[a]s given," kept "the jury from making that decision." Pl. C.A. Br. 21-22.[3]

The Eleventh Circuit decided Lozman's appeal of his First Amendment retaliatory arrest claim based solely on its no-probable-cause rule. Pet. App. 10a-11a. If this Court grants certiorari and reverses that decision, it can remand the case for the courts below to undertake the "deeply factbound analysis" into whether petitioner's arrest was instigated or ratified by City policymakers, *Wellness Int'l Network*, 135 S. Ct. at 1949. Although that issue will require further litigation, this is not a vehicle argument: Rather, it

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[3] Because petitioner proceeded on the theory that his arrest was directed, approved, or ratified by City policymakers, the City's disquisition on "informal custom" and "city ordinance[s]," BIO 11-12, is a red herring.

describes this Court's "ordinary practice of remanding," for reconsideration "under the proper standard." *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014).

III. This Court should not extend *Hartman*'s rule to retaliatory arrest claims.

1. The City argues that the "two primary reasons" this Court gave in *Hartman v. Moore*, 547 U.S. 250 (2006), for why plaintiffs in retaliatory prosecution cases must plead and prove lack of probable cause both "apply to the retaliatory-arrest context." BIO 14. They do not.

First, the City confuses whether evidence is relevant with whether it is available. Yes, the existence of probable cause can be relevant in a retaliatory arrest case to whether there is a retaliatory motive in the first place or to whether that motive is the but-for cause of the plaintiff's arrest. Pet. 25; BIO 14. But as petitioner has already explained, many arrests never produce a charging document (while all prosecutions do). And probable cause can be established under this Court's Fourth Amendment doctrine by pointing to offenses that are neither "'closely related' to," nor "based on the same conduct as, the offense identified by the arresting officer at the time of arrest." *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *see* Pet. 28-30. Thus, even if evidence regarding the existence of probable cause will at some point become "available" in retaliatory arrest cases, *Reichle v. Howards*, 566 U.S. 658, 668 (2012), this does not mean that the *plaintiff* can be expected to have this evidence at the pleading stage or to know for which crimes he must address

probable cause. The defendant is better situated in both respects.

The City offers no response to these points. Indeed, the City ignores the fact that, in this very case, the offense for which petitioner was required to prove the absence of probable cause—disturbing a lawful assembly—"popped up" midway through a multiweek civil trial, Tr. 8 (12/12/2014), ECF 784, eight years after the underlying arrest. Pet. 8, 29-30.

Second, the City misunderstands *Hartman*'s discussion of the "distinct problem of causation," 547 U.S. at 263. As this Court explained, given absolute prosecutorial immunity from suit, the defendant in such cases is a nonprosecuting official sued not "strictly for retaliatory prosecution, but [rather] for successful retaliatory inducement to prosecute." *Id.* at 262. A prosecutor cloaked in the "presumption of regularity accorded to prosecutorial decisionmaking," *id.* at 263, independently makes the decision whether to maintain the prosecution. Thus, "[t]he intervening decision of the third-party prosecutor widens the causal gap between the defendant's animus and the plaintiff's injury." *Reichle*, 566 U.S. at 668.

Retaliatory arrest cases are more straightforward. In many cases, the unconstitutional motive is harbored by the arresting officer himself. The causal connection between motive and injury is not "attenuated" in any way. *Reichle*, 566 U.S. at 668. And because the presumption of regularity "does not apply" to retaliatory arrests, *id.* at 669, it makes sense to place the burden on the officer-defendant to show that he would have arrested the plaintiff even absent his impermissible motive. The standard framework for First Amendment retaliation cases laid out in *Mt.*

Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), gives him a full and fair opportunity to do so. *See* Pet. 22-25.

To be sure, there are retaliatory arrest cases where the plaintiff alleges a retaliatory motive on the part of a supervisor or a municipality, not the officer who directly effected the arrest. BIO 16. Unlike prosecutors, police officers often make arrests at a higher-level official's command (as allegedly happened here). But those cases can be decided using standard principles for determining supervisory or municipal liability. There is nothing about the fact that an injury involves an arrest, rather than denial of a promotion or a parade permit, that would justify giving the municipality greater protection here.

2. The City's threat that applying the *Mt. Healthy* framework to retaliatory arrest claims will prohibit "everyday, uncontroversial policing tactics," BIO 17, is simple bluster.

The rule petitioner proposes has operated within the Ninth Circuit for over a decade. Pet. 24-25. The City points to nothing to suggest it has hampered effective policing there. Moreover, as petitioner already explained, *see* Pet. 24-25, pleading rules and the *Mt. Healthy* framework relieve all but the most blatantly retaliatory officers of the risk of "*personal liability* for relying on potential arrestees' speech," BIO 19—particularly given the backstop of qualified immunity.

The City's argument rests on a straw man. Petitioner has never argued that speech cannot be taken into account in deciding whether to make an arrest.

What he argues—and what the *Mt. Healthy* framework requires—is that the arrest not be the product of (1) *retaliatory animus* against (2) *protected* speech.

To begin with, some of the speech the City points to in other cases is not protected by the First Amendment. The City ignores the principle that "[s]pecific criminal acts are not protected speech even if speech is the means for their commission." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Thus, if police decide to arrest for public intoxication a "drunk [who] is making aggressive statements" that lead them to believe he is "likely to be a threat to public safety," BIO 19, the drunkard's claim will fail at the first step of the *Mt. Healthy* inquiry.

And even with respect to protected speech, if that speech "provides evidence of a crime," BIO 17 (quoting *Reichle*, 566 U.S. at 668), plaintiffs will lose so long as police generally make arrests for that crime—as they no doubt do when faced with evidence of serious felonies or dangers to the public. In such cases, plaintiffs will lose under *Mt. Healthy* because the police "would have made the same decision absent the forbidden consideration." *Texas v. Lesage*, 528 U.S. 18, 20-21 (1999).

But petitioner's case is materially different. The district court held, and the City has never disputed, that petitioner engaged in protected First Amendment activity when he offered "public criticism" of City redevelopment projects, "expressed" views "about perceived public corruption in the City," and "fil[ed] a 'Government in the Sunshine' suit against the City," Pet. App. 52a. The City has never suggested that any of these actions—none of which coincided with petitioner's arrest—provided *any* evidence of a crime or a threat.

Even if officers "cannot enforce every violation of every law" and "must 'use some discretion in deciding when and where' to do so," BIO 18 (citation omitted), the City's declaration that "[o]ften, a potential arrestee's protected speech will inform the exercise of [police officers'] discretion," *id.*, is chilling. The City tellingly offers no defense of why governments should be entitled to enforce minor offenses only against individuals whose speech (or religion or associations, for that matter) they do not like. The City attacks petitioner's prior criticisms of City officials, BIO 1-2, and asserts its entitlement to cut off petitioner's allotted three-minute period for commenting because his first words did not directly mention municipal corruption, *see id.* 2. This Court should make clear that the City cannot revive the discredited doctrines of seditious libel and prior restraint by wrapping them in the cloak of an arrest for whatever offense its lawyers can years later conjure from the Florida Code.

3. The City's argument with respect to the Equal Protection Clause undercuts its other arguments on the merits. The City's proffered distinction between that clause and the First Amendment—that the former "exists to prohibit government actors from making otherwise-valid enforcement decisions based on race and other irrelevant considerations," while "[p]rotecting against retaliatory arrests is but a small fraction of what the First Amendment does," BIO 21—makes no sense. *Both* constitutional provisions exist to prohibit government from imposing otherwise acceptable burdens on the basis of forbidden criteria. And protecting against retaliatory arrests is but a small fraction of what *either* provision is designed to accomplish.

Still worse, the City suggests with apparent approval that "an arrest motivated by protected speech may constitute an arbitrary enforcement decision that gives rise to an Equal Protection claim" even when there is probable cause, BIO 21. If the City is comfortable with addressing these claims through the Equal Protection Clause, it should not resist having them adjudicated more straightforwardly under the First Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

FANE LOZMAN,
Petitioner,

v.

CITY OF RIVIERA BEACH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE FIRST AMENDMENT FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus First Amendment Foundation is a nonprofit organization dedicated to promoting government openness and transparency throughout Florida, at both the state and local government levels. In addition to working with volunteers to audit government compliance with open meetings, public records, and other "sunshine" laws, the Foundation educates government officials, journalists, and the public about citizens' rights to obtain information from their governments. The Foundation also operates a hotline to answer questions about open government laws, handling more than 150 inquiries per month. Some of these inquiries come from members of the public expressing concerns about government retaliation or intimidation after exercising their right to request information.

A number of the Foundation's members have reported facing intimidation or retaliation for exercising their First Amendment rights. For instance, one member told the Foundation that she submitted a public records request at a police station as part of one of the Foundation's compliance audits—and was followed home by the police.

---

[1] Counsel for both parties received timely notice of the Foundation's intent to file this brief and have consented to its filing. Each party's written consent to the filing of this brief has been submitted with the Clerk of the Court pursuant to Rule 37.2. In accordance with Rule 37.6, the Foundation confirms that no counsel for any party authored this brief in whole or in part, and that no person other than the Foundation's counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Another member reported to the Foundation that he requested public records, and went to City Hall to pick them up—and was arrested for trespass upon arriving.

In light of its mission and the reported experiences of its members, the Foundation has a strong interest in the public's ability to exercise its First Amendment rights, such as the right to request information from government officials. Accordingly, the Foundation has an interest in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari presents the important question whether the presence of probable cause, standing alone, bars a First Amendment retaliatory arrest claim. Because police have broad discretion to arrest citizens for even minor infractions, retaliatory arrests in response to protected First Amendment activity are a serious problem. This problem is not a hypothetical one: the court of appeals found petitioner Lozman's evidence that he was arrested in retaliation for protected speech to be "compelling," Pet. App. 10a, and there are numerous examples of First Amendment retaliatory arrest cases from around the country.

The rule set forth in the decision below effectively insulates municipalities and officials from liability for most claims seeking redress for such government retaliation. The danger of being arrested in retaliation for engaging in protected speech threatens to chill the exercise of core First Amendment rights

such as questioning or otherwise criticizing the government. The potential chilling effect is especially acute in smaller towns and cities across America, where vocal critics often continuously interact with local officials and are therefore at risk of retaliation. This Court's intervention is necessary to protect a citizen's ability to seek redress where she has been subjected to an unconstitutional retaliatory arrest, and to prevent the continued chilling of First Amendment expression in jurisdictions where the "no probable cause" rule is in place.

In view of the importance of the question presented, this Court should grant review to resolve the circuit conflict identified in the petition. This case is an ideal vehicle for the Court to do so, and to establish that probable cause, standing alone, does not automatically defeat a First Amendment claim for retaliatory arrest.

ARGUMENT

I. Retaliatory Arrests In Response To Protected First Amendment Activity Are A Significant, Recurring Problem.

The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Reflecting this "profound national commitment" to the freedom of expression, *id.*, "the law is settled that as a general

matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out," *Hartman v. Moore*, 547 U.S. 250, 256 (2006). The ability to bring a damages action when such "retaliatory actions" occur, *id.*, serves as both an important check on government abuse, and an opportunity—often the only one—for the individual to vindicate her rights. *See, e.g.*, 42 U.S.C. § 1983; *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978).

The decision below severely limits the effectiveness of this check, barring a plaintiff from stating a claim for retaliatory arrest where there is probable cause that she has committed *any* infraction. Given the myriad federal, state, and local laws and regulations that govern everyday activities, most of us routinely—and unintentionally—commit minor infractions. Under the decision below, probable cause to believe a person has committed any of these infractions will immunize a retaliatory arrest from First Amendment challenge, leaving citizens with no effective means of addressing the chilling effect such arrests create.

A. Because Citizens Can Be Arrested For Minor Infractions, Allowing Probable Cause To Bar First Amendment Retaliatory Arrest Claims Effectively Insulates Municipalities And Officials From Liability.

Given the wide range of offenses that can lead to arrest in today's world, the decision below effectively

immunizes municipalities and officials against First Amendment retaliatory arrest claims.

1. Most individuals, often inadvertently, commit some sort of arrestable infraction on a regular, if not daily, basis. Consider these observations about the typical American traffic code:

> There is no detail of driving too small, no piece of equipment too insignificant, no item of automobile regulation too arcane to be made the subject of a traffic offense. Police officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation. . . . For example, in any number of jurisdictions, police can stop drivers not only for driving too fast, but for driving too slow. In Utah, drivers must signal for at least three seconds before changing lanes; a two second signal would violate the law. In many states, a driver must signal for at least one hundred feet before turning right; ninety-five feet would make the driver a[n] offender. . . . Many states have made it a crime to drive with a malfunctioning taillight, a rear-tag illumination bulb that does not work, or tires without sufficient tread. They also require drivers to display not only license tags, but yearly validation stickers, pollution control stickers, and safety inspection stickers; driving

> without these items displayed on the vehicle in the proper place violates the law.

David A. Harris, *"Driving While Black" and All Other Traffic Offenses*, 87 J. CRIM. L. & CRIMINOLOGY 544, 557–59 (1997) (citations omitted).

Such intricate regulatory systems are not unique to the traffic code—thousands of federal and state laws criminalize a wide range of activity. *See, e.g.*, *Overcriminalization*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, https://www.nacdl.org/overcrim/ (last visited July 26, 2017) (observing that there are "over 4,450 crimes scattered throughout the federal criminal code, and untold numbers of federal regulatory criminal provisions"); *Overcriminalization*, RIGHT ON CRIME, http://rightoncrime.com/category/priority-issues/overcriminalization/ (last visited July 26, 2017); *id.* (observing that Texas alone has more than 1,700 crimes on the books).

Officers have wide discretion under state and federal law to arrest individuals for these offenses, however minor. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 323, 344 & nn. 12–13, 355–60 (2001); U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEP'T 82 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (discussing the Ferguson Police Department's "aggressive enforcement of even minor municipal infractions"); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1359 (2012) ("The breadth of street crime

violations—loitering, trespassing, gang injunctions, and the like—confers vast power on urban police that permits widespread arrests for petty offenses. . . . Incarceration and increasingly harsh punishment can flow from the pettiest of behaviors, triggered by the slightest impulse on the part of the police to arrest."). The sheer breadth of police discretion gives rise to a significant danger that officers or other officials will sometimes decide to arrest individuals for improper reasons—including in retaliation for their protected speech.

2. That danger is hardly hypothetical, as illustrated by retaliatory arrest cases from around the country. For example, with some frequency, individuals are arrested as a result of disagreements with police in connection with the exercise of their First Amendment rights:

- In *Allen v. Cisneros*,[2] 815 F.3d 239 (5th Cir. 2016), a Houston street preacher alleged that he had been subjected to two retaliatory arrests in violation of his First Amendment rights. *Id.* at 241–43. Both times, he was arrested after preaching on the street carrying a shofar, which "is a trumpet-like instrument made from a ram's horn" that is "used in Judaism to mark the holidays of Rosh Hashanah and Yom Kippur." *Id.* at 241–43 & n.1. The preacher and the defendants had

[2] In summarizing this and other cases, the Foundation sets out the facts as laid out in the court order or opinion. As many of these orders and opinions discuss motions to dismiss or motions for summary judgment, the facts are generally described in the light most favorable to the plaintiff.

differing versions of the events that transpired, with the preacher alleging that, each time, he had been arrested after trying to film the police. *See id.* at 242–43. But because the plaintiff's "possession of his shofar independently provided reasonable suspicion for his detention" based on a "city ordinance" that "specifically prohibited 'carry[ing] or possess[ing] while participating in any demonstration' objects that 'exceed three-quarters inch in their thickest dimension,'" *id.* at 245 (alterations in original), the Fifth Circuit reversed the district court's denial of summary judgment in the officers' favor. *See id.* at 245–47.

- In *Hoyland v. McMenomy*, 185 F. Supp. 3d 1111 (D. Minn. 2016), the plaintiff awoke to sounds of the police arresting his wife outside their home. *Id.* at 1116. He opened the door and informed the police that his wife had a physical disability; he also began filming the encounter. *Id.* The officers commanded him to drop his camera and go back inside. *Id.* at 1117. After the plaintiff stayed in his doorway and continued to attempt to communicate his wife's disability to the officers, he was arrested for obstruction of legal process. *Id.* at 1117–18. After a Minnesota state court dismissed the charges due to lack of probable cause, the plaintiff brought a First Amendment retaliatory arrest claim. *Id.* at 1119. The district court denied the officers' motion for qualified immunity, pointing out that the state court had already determined that the officers

lacked probable cause. *Id.* at 1122–28 & n.20. The court emphasized, however, that the officers would be later entitled to qualified immunity if they could demonstrate that they had *arguable* probable cause to support the arrest, a lower bar. *Id.* at 1122–23, 1128.

- In *Baldauf v. Davidson*, No. 1:04-cv-1571-JDT-TAB, 2007 WL 2156065 (S.D. Ind. July 24, 2007) (hereinafter *Baldauf II*), the plaintiff was arrested after a confrontation with a police officer at a convenience store. *Id.* at *1. At one point, the officer pointed a finger at the plaintiff, but she pushed it aside. *Id.* After the confrontation, the officer told the plaintiff that "he was not going to arrest her and that she could leave." *Id.* But as the plaintiff "was leaving, she told [the officer] that she was going to file a complaint with" the police chief. *Id.* The officer later arrested her when she was talking to the police chief at the station. *Id.* The district court determined that, although the plaintiff may have had an "otherwise worthy [retaliatory arrest] claim," it was barred by the existence of probable cause that she had committed battery. *Id.* at *1, *4; *see also Baldauf v. Davidson*, No. 1:04-cv-1571-JDT-TAB, 2007 WL 1202911, at *4 (S.D. Ind. Apr. 23, 2007) (hereinafter *Baldauf I*) (existence of probable cause as to battery). The court accordingly granted summary judgment in the defendants' favor on this claim. *Id.* at *6.

- In *Laning v. Doyle*, No. 3:14-cv-24, 2015 WL 710427 (S.D. Ohio Feb. 18, 2015), a 63-year-old woman was pulled over in a strip mall parking lot for a traffic violation. *Id.* at *1. She did not immediately pull over once the officer "activated the lights on his police cruiser"; instead, she kept driving through the parking lot and parked outside of her office. *Id.* After the plaintiff stepped out of her car, the defendant officer pointed his taser at her. *Id.* "[S]he asked why she was being detained," but he did not respond and instead forcefully arrested her, allegedly in retaliation for her question. *Id.* at *1, *14. On the way to the jail, the plaintiff alleged that the officer drove erratically—doing donuts in a parking lot—and verbally taunted her. *Id.* at *1. The court held that while it was not clearly established that the officer lacked probable cause to arrest the plaintiff for failing to comply with an officer based on her failure to immediately pull over, *id.* at *7–9, the allegations viewed in the light most favorable to her could support a finding that the officer retaliated against her for exercising her First Amendment right to "question[] why he had pulled her over," *id.* at *15.

Retaliatory arrests are not limited to the context of police confrontations. As petitioner's case and the examples below demonstrate, such arrests often target citizens for criticizing the government:

- In *Roper v. City of New York*, No. 15 Civ. 8899 (PAE), 2017 WL 2483813 (S.D.N.Y. June 7,

2017), two photographers filed First Amendment retaliatory arrest claims after being arrested during a Black Lives Matter protest in Times Square. *Id.* at *1, *3. One plaintiff was arrested "for standing in the street" after being told by police "to move from the street to the sidewalk"—but could not do so because police barricades and other officers were in the way. *Id.* at *1. The second plaintiff, a photojournalist, had crossed the street to find a restroom—but was arrested for disorderly conduct after he failed to use a crosswalk, even though police were blocking the crosswalks. *Id.* Because the police had probable cause to arrest the "plaintiffs for violating . . . traffic rules" relating to sidewalk use, the plaintiffs' retaliatory arrest claims had to be dismissed under Second Circuit law, "even assuming that compliance with the . . . [police's] dispersal orders was not realistically possible." *Id.* at *3–5.

- In *Morse v. San Francisco Bay Area Rapid Transit District (BART)*, No. 12-cv-5289 JSC, 2014 WL 572352 (N.D. Cal. Feb. 11, 2014), a journalist brought a retaliatory arrest claim after he was arrested by a Bay Area Rapid Transit ("BART") Deputy Police Chief while documenting a peaceful protest. *Id.* at *1. The plaintiff had a history of writing and publishing articles critical of the BART police, even "openly mock[ing] and ridicul[ing] the agency and its officers." *Id.* at *1–4, *9. By the time of the plaintiff's arrest, he was "'personally acquainted' with leaders of the BART organiza-

tion," leading the police to, before the protest where the plaintiff was arrested, distribute flyers identifying him and give orders to arrest him if he "incite[d] a riot or act[ed] in a criminal manner." *Id.* at *2, *4. Ultimately, the plaintiff was the sole member of the media arrested for standing in front of a fare gate—even though his conduct was indistinguishable from that of other journalists at the protest. *Id.* at *6–7, *9–10. Although the officer had probable cause to arrest the plaintiff for hindering the operation of a rail line, the district court, after identifying the ample evidence suggestive of defendants' retaliatory motive, denied the defendants' motion for summary judgment on the plaintiff's retaliatory arrest claim under Ninth Circuit law. *Id.* at *9–15.

- In *Fernandes v. City of Jersey City*, Civ. No. 2:16-cv-07789-KM-JBC, 2017 WL 2799698 (D.N.J. June 27, 2017), one plaintiff brought a First Amendment retaliation claim after being forcibly removed from a City Council meeting at the mayor's request. *Id.* at *3, *9–11. A few months before that removal, the plaintiff and his wife (also a plaintiff in the action, but who was not subjected to a retaliatory arrest) obtained a construction permit and began to remodel their home. *Id.* at *2. But within days, City officials came onsite and ordered them to stop, even though by that point the siding had already been removed, "resulting in weather damage" when they were unable to continue the project. *Id.* at *1–2. The plaintiff began attending City Council meetings and

other public meetings to complain about the City's conduct. *Id.* at *3. "At one such meeting," the City Council President "accosted" the plaintiff; at another, the plaintiff was forcibly removed at the mayor's request even though, according to the plaintiff, he had not done anything to cause a disturbance. *Id.* The defendants argued that they did, in fact, have probable cause to remove him for causing a disturbance. *Id.* at *11. The court concluded that there was a genuine issue of material fact as to the existence of probable cause, and denied defendant officers' motion to dismiss on qualified immunity grounds accordingly. *Id.* at *11, *15–16.

- In *Galarnyk v. Fraser*, 687 F.3d 1070 (8th Cir. 2012), a bridge safety consultant criticized a government agency on a number of national news networks after a bridge collapsed in Minnesota, and later visited the collapse investigation command center to discuss his concerns with officials. *Id.* at 1071–72. After meeting with an official in one of the command center's trailers, he entered another trailer without permission and further criticized the government. *Id.* at 1072. He was asked to leave, and did. *Id.* But he was stopped by a law enforcement officer after he had begun to leave the site, and was arrested shortly thereafter. *Id.* at 1073. Despite the plaintiff's allegations that the officer who stopped him repeatedly commented to a colleague that the plaintiff needed to be "locked up" for speaking out about the bridge collapse on national

> television, *id.* at 1073, the Eighth Circuit affirmed the dismissal of the safety consultant's claim on summary judgment because there was probable cause that he had trespassed, *id.* at 1076.

The sheer number of minor infractions—carrying a shofar, failing to step onto a sidewalk, blocking a fare gate, or entering a trailer—for which these plaintiffs were arrested demonstrates that any given retaliatory arrest will likely be supported by probable cause that the arrestee committed some offense, however minor. The rule that the existence of probable cause bars the plaintiff's claim entirely thus effectively immunizes potentially retaliatory arrests from judicial scrutiny.

3. The breadth of the immunity conferred by the decision below is confirmed by two additional, significant consequences of the Eleventh Circuit's rule.

First, because probable cause is an objective inquiry, defendants can raise multiple theories of probable cause in the hope that the court accepts one, pointing to alleged infractions that were not even on the officer's mind, or communicated to the plaintiff, at the time of arrest. So in *Roper*, while the officers had originally arrested the plaintiffs for disorderly conduct at the Black Lives Matter protest, the court upheld the existence of "probable cause to arrest" them "for offenses relating to pedestrian traffic." 2017 WL 2483813, at *3–4. The court explained that "the relevant inquiry is 'whether probable cause existed to arrest for *any* crime,' not necessarily for the

crimes cited by the officers or ultimately charged." *Id.* at *3 (emphasis added) (quoting *Marcavage v. City of N.Y.*, 689 F.3d 98, 109 (2d Cir. 2012)). And so the existence of probable cause that the plaintiffs had "violat[ed] . . . traffic rules" precluded their claim as a matter of law. *Id.* at *3–4.

Petitioner Lozman's case serves as a prime example of the troubling consequences of allowing probable cause to be a moving target. Lozman filed a lawsuit against Respondent City of Riviera Beach alleging the violation of government transparency laws, Pet. App. 17a—quintessentially protected speech under the First Amendment, *see Bill Johnson's Rests. Inc. v. NLRB*, 461 U.S. 731, 741 (1983). A few months later, when Lozman tried to speak at a City Council meeting, a Councilmember who had previously stated a desire to "intimidate" Lozman in response to the lawsuit ordered Lozman's arrest. Pet. App. 3a–4a. Lozman was then charged with two crimes: disorderly conduct and resisting arrest. The prosecutor never pursued the charges. Pet. App. 4a.

In the course of this lawsuit challenging that retaliatory arrest, the district court "expressed doubt" that the City would be able to demonstrate at trial that there was probable cause as to *either* offense. *See* Pet. 8–9 (citing record evidence). So the City switched gears *during trial*, alleging probable cause for a different offense that had not been raised up to that point: disturbance of a lawful assembly. *See id.* (citing record evidence). The Eleventh Circuit accepted that the existence of probable cause as to that third, new offense meant that Lozman's

retaliatory arrest claim failed as a matter of law. Pet. App. 7a–9a, 11a. In the face of clear evidence that City officials acted with retaliatory intent and a significant question whether there was probable cause for the offenses for which petitioner was actually arrested, the City was able to defeat petitioner's claim by testing theories of probable cause until it hit on one that stuck.

Second, the Eleventh Circuit's "no probable cause" rule bars First Amendment retaliatory arrest claims in the face of probable cause even where there is strong evidence of a retaliatory motive—as happened below. Petitioner Lozman's arrest was just one event in a longer string of reprisals committed by the City, much of which is documented in *Lozman v. City of Riviera Beach*, 568 U.S. 115, 118–19 (2013), and discussed in the petition, *see* Pet. 4–5. What is more, the record below included Councilmember Wade's comments stating, in a closed-door session, that she wanted to "intimidate" petitioner and send him a "message" because of his lawsuit against the City. Pet. App. 3a, 18a. Yet even though the Eleventh Circuit concluded that petitioner "seems to have established a sufficient causal nexus between Councilperson Wade and the alleged constitutional injury of his arrest," *id.* at 10a, it held that the existence of probable cause rendered that conclusion irrelevant.

And so it is that the *Roper* plaintiffs could not pursue a retaliatory arrest claim even though one plaintiff, before he was arrested at the Black Lives Matter protest, "heard an NYPD supervisor instruct his officers to '[j]ust take somebody and put them in

handcuffs.'" 2017 WL 2483813, at *1 (alteration in original). And that Galarnyk, the plaintiff bridge consultant, could not survive summary judgment on his retaliatory arrest claim despite the fact that one officer asserted repeatedly that Galarnyk needed to be "locked up" for sharing his views about the bridge collapse on national television. *Galarnyk*, 687 F.3d at 1073. And that the plaintiff involved in a confrontation with a small-town police officer could not withstand summary judgment on her retaliatory arrest claim, even though the officer had told her following the confrontation that he was not going to arrest her, but changed course after she threatened to, and did, report the officer to the police chief (who was also the town marshal). *Baldauf II*, 2007 WL 2156065, at *1, *4; *Baldauf I*, 2007 WL 1202911, at *1.

In contrast, because journalist Morse was arrested in California, his First Amendment retaliatory arrest claim against the BART Police could proceed despite the existence of probable cause for interfering with a rail line. *Morse*, 2014 WL 572352, at *11–15. But if he had been arrested in Florida instead, his claim would have failed as a matter of law—notwithstanding Morse's presentation of evidence that BART police officers knew of inflammatory articles he had written about them; had circulated flyers with an image of his face prior to the protest; and preemptively ordered his arrest if he did anything criminal. *Id.* at *3–4.

Under the more nuanced rule that petitioner advocates, the existence of probable cause would still be relevant evidence of the defendant's lack of

retaliatory intent. *See* Pet. 25. But the existence of probable cause, without more, would not prevent a plaintiff who is able to establish that she was in fact arrested in retaliation for her speech from seeking redress for that constitutional injury.

B. Immunizing Municipalities And Officials From First Amendment Retaliatory Arrest Claims Risks Chilling The Exercise Of First Amendment Rights.

It is beyond dispute that the potential to be arrested for engaging in protected speech is likely to deter First Amendment activities. Indeed, the very reason that "[o]fficial reprisal for protected speech" is prohibited is because "it threatens to inhibit exercise of the protected right." *Hartman*, 547 U.S. at 256 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998)); *Ford v. City of Yakima*, 706 F.3d 1188, 1194 (9th Cir. 2013) ("[A] person of ordinary firmness would be chilled from future exercise of his First Amendment rights if he were booked and taken to jail in retaliation for his speech."). And such chilling extends beyond the target of government reprisal; retaliation against "one tells the others that they engage in protected activity at their peril." *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1419 (2016).

An individual's ability to bring a First Amendment retaliatory arrest claim against vindictive government officials serves as an important check on such reprisal and the resultant chilling of protected activity. *See generally Morse*, 2014 WL 572352 (plaintiff journalist's claim for retaliatory arrest by

BART police could move forward); *Hoyland*, 185 F. Supp. 3d 1111 (husband's claim for retaliatory arrest after he had tried to tell the police that his wife was disabled could move forward); *see also Naveed v. City of San Jose*, No. 15-cv-05298-PSG, 2016 WL 2957147, at *1, *5–6 (N.D. Cal. May 23, 2016) (permitting First Amendment retaliatory arrest claim to proceed, despite the existence of probable cause to support the arrest, where the plaintiffs were arrested after attempting to film the police; and concluding that defendant officers' alleged "conduct would chill a person of ordinary firmness from future First Amendment activity"). Such suits help deter retaliatory conduct, making it less likely to happen in the future. And from the plaintiff's perspective, an-after-the-fact damages suit is generally the only means she has to vindicate her rights after a retaliatory arrest.

But in jurisdictions where probable cause bars a First Amendment retaliatory arrest claim as a matter of law, this check is effectively absent. Again, this case crystallizes the issue: the decision below functionally gives officials carte blanche to order a citizen arrested for the express purpose of "intimidat[ing]" him into no longer criticizing the government, Pet. App. 3a. Other residents of the City of Riviera Beach—not to mention other citizens, including Foundation members, across the State—could very well conclude that the danger of being arrested (and being taken to the police station, booked, and jailed) is simply too high a price to pay for the privilege of commenting on government policies or otherwise engaging in protected activity.

That chilling effect is precisely what the First Amendment guards against.

This risk of self-censoring is particularly acute in interactions between individuals and their local governments—especially in smaller cities and towns. As this case demonstrates, in these smaller towns, citizens are much likelier to interact with their governments and government officials on a regular basis. And government critics are more likely to be known to their government officials. It is no coincidence that in petitioner's case, and in a number of the cases discussed above, the retaliatory arrests at issue were effected by local government officials in smaller cities and towns. *See, e.g.*, Public Data, GOOGLE, goo.gl/eAu6bn (last visited July 26, 2017) (Riviera Beach, Florida, where petitioner Lozman was arrested, has a population of 34,244; Pittsboro, Indiana, where plaintiff Baldauf got into an altercation with a police officer in a convenience store, has a population of 3,283; Huber Heights, Ohio, where 63-year-old plaintiff Laning was pulled over, arrested, and forced to ride in a police car while the officer did "donuts," has a population of 38,019; Rosemount, Minnesota, where plaintiff Hoyland was arrested after trying to inform the police of his wife's disability, has a population of 23,911).

II. This Court Should Resolve The Circuit Conflict Concerning Whether Probable Cause Bars A Retaliatory Arrest Claim, And This Case Presents An Ideal Vehicle For Doing So.

A. As the petition demonstrates and the decisions discussed above confirm, the question whether the existence of probable cause bars a challenge to a retaliatory arrest is an important one on which the lower courts have diverged. Without this Court's intervention, the circuit conflict will leave both individuals and government officials uncertain as to the law governing retaliatory arrests. *Compare, e.g.*, *Naveed*, 2016 WL 2957147, at *5–6 (declining, based on Ninth Circuit precedent, to dismiss a retaliatory arrest claim despite the existence of probable cause); *Morse*, 2014 WL 572352, at *1, *11–13 (denying the defendant's motion for summary judgment on a retaliatory arrest claim despite probable cause), *with Roper*, 2017 WL 2483813, at *1, *3–4 (dismissing retaliatory arrest claim under Second Circuit law because probable cause existed for jaywalking); *Galarnyk*, 687 F.3d at 1076 (similar, under Eighth Circuit law, in light of probable cause for trespassing), *with Marshall v. City of Farmington Hills*, No. 15-2380, 2017 WL 2380650, at *3, *6–8 (6th Cir. June 1, 2017) (pointing to *Reichle v. Howards*, 566 U.S. 658 (2012), in affirming, on qualified immunity grounds, dismissal of the plaintiff's First Amendment retaliatory arrest claim, due to the existence of probable cause); *Dukore v. District of Columbia*, 799 F.3d 1137 (D.C. Cir. 2015) (similar).

B. Petitioner Lozman's case presents several features that make it the ideal vehicle for resolving this ongoing confusion among lower courts: (1) the only defendant—Respondent City of Riviera Beach—is a municipality, such that qualified immunity is unavailable; (2) the existence of probable cause is undisputed; and (3) there is no question that Lozman's conduct leading to his arrest—his filing of a lawsuit against the City alleging illegal conduct—is protected by the First Amendment. Thus, unlike in *Reichle v. Howards*, 566 U.S. 658 (2012), there are no antecedent questions that could prevent the Court from reaching the question presented. The Court should take this opportunity to resolve the disagreement in the lower courts, and it should hold that the existence of probable cause does not bar a First Amendment retaliation claim as a matter of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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No. 17-21

In the Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*

The Institute for Justice (IJ) is a nonprofit public-interest law firm that litigates in support of greater judicial protection for individual rights, including citizens' First Amendment right to speak about issues of public concern in their communities.[1]

As part of its efforts, IJ works to empower citizens affected by local government policies to become activists for change. IJ has trained thousands of these activists in person, including more than 2,400 property rights activists whose homes or businesses were threatened with blight designations or eminent domain and more than 900 entrepreneurs whose businesses were negatively impacted by regulation. IJ has also worked with more than 150 communities of property owners and entrepreneurs who sought to change local law or oppose harmful proposed projects—including, for example, a group of food truck owners in Sarasota, Florida, fighting an ordinance prohibiting food trucks from operating within 800 feet of a brick-and-mortar restaurant without the

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties' written consents to the filing of this brief have been filed concurrently with the brief.

owner's consent, and homeowners in a Charlestown, Indiana, neighborhood targeted for redevelopment.

In addition to training activists in person, IJ has assisted countless others by publishing "survival guides" for entrepreneurs and opponents of eminent domain to use in organizing grassroots political campaigns in their communities. See, *e.g.*, Inst. for Justice, *Entrepreneur's Survival Guide* (Sept. 2014), perma.cc/PFG5-BK54. These guides instruct activists on how to advocate for change in local government policies, including how to speak out at local government meetings and legislative hearings.

In light of its mission to empower citizen activists, IJ has a strong interest in ensuring that courts are able to hold local governments accountable when they unlawfully arrest individuals in retaliation for exercising their First Amendment rights. The question presented in this case directly implicates that interest.

The court of appeals' holding that petitioner's retaliatory arrest claim was barred because the arrest was supported by probable cause was wrong and, if allowed to stand, will seriously erode Americans' ability to exercise their First Amendment rights. By foreclosing any judicial inquiry into the motivations behind an arrest—even where there is substantial evidence of a retaliatory motive—the court of appeals' probable cause bar will block a large number of meritorious retaliatory arrest claims. Moreover, by replacing the burden-shifting framework of *Mt. Healthy City School District Bd. of Education* v. *Doyle*, 429 U.S. 274 (1977), with a legal standard far more deferential to the government, the court of appeals' approach encourages officials to retaliate through arrests (which are no longer subject to an ef-

fective First Amendment check), rather than by other means that remain subject to meaningful First Amendment scrutiny.

The effect of the court of appeals' holding will be to deter many citizens from speaking on issues of public concern. Virtually everyone could be arrested for *some* offense, such as a traffic violation, if he or she fell into official disfavor, and the court of appeals' rule ensures that any First Amendment claim based on such an arrest will fail as long as probable cause existed. Faced with the risk of retaliatory arrest and likely deprived of any legal recourse, many citizen activists will censor themselves rather than speak out—a result that cannot be squared with the values behind the First Amendment. This troubling prospect cries out for this Court's intervention.

ARGUMENT

A. The question presented implicates important First Amendment values.

1. Democracy in America works when, and only when, members of the public are free to participate in every aspect of the political process. It is crucial that citizens not only vote on Election Day but also remain engaged by speaking on issues of public concern and expressing their views to their elected officials.

Citizen speech, as this Court has explained, is essential to democratic governance because it is the mechanism by which public opinion informs government action. The American system presupposes that politicians will be "cognizant of and responsive to [the] concerns" of their constituents; indeed, "[s]uch responsiveness is key to the very concept of self-governance through elected officials." *McCutcheon* v.

FEC, 134 S. Ct. 1434, 1462 (2014). This responsiveness, in turn, depends on maintaining a culture of open and robust public discourse. See *Stromberg* v. *People of State of Cal.*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people * * *, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."). Public debate on critical issues indicates to elected officials what their constituents expect—and by drawing the public into the political process, it fosters a spirit of civic-mindedness.

That is nowhere more true than at the local level. "[P]articipation in local government is"—and has long been—"a cornerstone of American democracy." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part). As early as the 1830s, Alexis de Tocqueville found it "[i]ncontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies," where citizens learned, and exercised, the "manners and customs of a free people" by deliberating over solutions to local problems. *Id.* (quoting 1 Alexis de Tocqueville, *Democracy in America* 181 (H. Reeve trans. 1961)). And what was true then is still true today: many people's political activity remains centered on city councils, school boards, and other local bodies.

It is no surprise that citizen participation is especially called for in local government. State and local governments, as Alexander Hamilton observed, "regulat[e] all those personal interests and familiar concerns to which the sensibility of individuals is

more immediately awake." The Federalist No. 17, at 107 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Local governments decide when to invoke the power of eminent domain; they control the permissible uses of real property, through zoning laws; they regulate the terms on which businesses are permitted to operate; and much more besides. The decisions that local governments make on these issues rarely grab headlines outside of a particular community, but for the people affected by them, they are enormously consequential. Thus, it is vitally important that citizens be able to speak freely to their local government when it takes actions that may affect them.

2. Speaking one's mind to local government, however, is sometimes difficult. A person who expresses a view contrary to that of local officials may be received with indifference or outright hostility—particularly when the forces on the other side of an issue are well organized and well financed. Advocacy for change in local policies can thus be daunting for citizens unused to direct participation in the political process.

Citizen activists come from varied backgrounds and walks of life, but in general, they are people who have never been politically engaged before and who may not have a good understanding of how the political process works. They usually have become interested in local politics not for ideological reasons, but because a specific government policy is likely to impact their rights or their livelihood. They are also predominantly on the lower end of the economic ladder; many, for example, are first-generation immigrants seeking to establish or hold on to small businesses, or owners of modest homes who cannot afford

to stay in their communities if forced from where they currently live.

The experiences of these would-be activists allow them to offer a vitally important perspective on the impact of local government policies on people's lives, in areas ranging from business licensing and regulation to eminent domain to education policy. They also have the strongest motivation of anyone in their communities to put in the time and effort needed to speak out on those issues and organize campaigns for or against particular measures or legislation. But given their political inexperience and economic vulnerability, these activists are particularly susceptible to being deterred from speaking if they believe that they will face repercussions for doing so—as IJ's extensive experience training and educating activists has taught it.

B. Barring claims for retaliatory arrest where probable cause existed would severely chill First Amendment activity.

The categorical bar on First Amendment retaliation claims for arrests supported by probable cause that the court of appeals approved below deals a serious blow to First Amendment freedoms. Under that approach, courts are forbidden from undertaking the same kind of inquiry into the government's motives that they perform without difficulty in other First Amendment retaliation cases. Such an approach encourages local governments to deal with dissenters through arrests, rather than other kinds of retaliation that draw meaningful First Amendment scrutiny—which, in turn, exerts a serious chill on activists' protected political speech.

1. A categorical probable-cause bar prevents courts from identifying the true motive behind government retaliation.

Like many other constitutional doctrines, the First Amendment's protection against government retaliation for individuals' speech implicates courts in the task of determining the motivation for government action. In some areas of law, such as economic regulation, courts are highly deferential in assessing the government's or the legislature's intent, upholding government action as long as a conceivably rational basis for the government's decision exists—a test that is satisfied in all but "rare case[s]." See, *e.g.*, *Armour* v. *City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2080, 2084 (2012). But in First Amendment retaliation cases, courts take a much harder look at governmental intent.

In these cases, under the burden-shifting framework of *Mt. Healthy City School District Bd. of Education* v. *Doyle*, 429 U.S. 274, 287 (1977), plaintiffs need only show that their protected First Amendment activity was a "motivating factor" behind government action against them in order to make out a prima facie case of First Amendment retaliation. The burden then shifts to the government to show, by a preponderance of the evidence, "that it would have reached the same decision * * * even in the absence of the protected conduct." *Id.* This framework enables courts to hold government officials accountable for retaliation when they act with unlawful motives, while allowing official actions to stand when they would have been taken even absent any retaliation. And as petitioner notes, courts apply that test in countless cases—including retaliatory arrest cases—without difficulty. Pet. 23-25.

The court of appeals' approach, however, forecloses any inquiry into government officials' motive, holding instead that as long as probable cause for an arrest existed, a retaliatory arrest claim is barred. Pet. App. 7a-8a; see also, *e.g.*, *Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002) ("Whatever the officers' motivation, * * * the existence of probable cause to arrest [the plaintiff] defeats her First Amendment claim."). The result is to insulate officials from liability even where the circumstances of an arrest strongly indicate a retaliatory motive.

Indeed, that is precisely what happened here. Prior to the arrest at issue here, city council members had suggested "intimidat[ing]" petitioner and making him feel "heat" due to his opposition to the city's redevelopment plan. Pet. App. 3a. The city had also made petitioner "the target of a string of legal pressures," including attempting to evict him from the local marina (an action that a jury found was retaliation for petitioner's First Amendment activity), arresting him and removing him from a different council meeting, and much more besides. *Id.* at 19a-20a; see also Pet. 4. These facts make out a compelling case that petitioner's arrest was retaliation for petitioner's engagement in conduct protected by the First Amendment—yet the question of the city council's retaliatory intent became a moot one in light of the jury's finding of probable cause.

The protection afforded to First Amendment rights should not turn on the method by which the government infringes them—but that is the result of an approach that requires judges and juries to close their eyes to the improper motive behind retaliatory

arrests.[2] In circumstances like these, there is no compelling reason to preclude the trier of fact from assessing the motivation for an arrest and to hold the defendant liable if the arrest is found to have been in retaliation for First Amendment activity.

2. A categorical probable cause bar unduly chills First Amendment activity.

Given that the probable cause bar precludes many meritorious claims for retaliatory arrest from going forward (by precluding scrutiny of the motivation for the arrest), there can be no doubt that the bar severely chills First Amendment activity.

To begin with, this Court has often recognized that official retaliation for the exercise of individuals' First Amendment rights "offends the Constitution" by "threaten[ing] to inhibit exercise of the protected right." *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006) (quoting *Crawford-El* v. *Britton*, 523 U.S. 574, 588 n.10 (1998)); see also, *e.g.*, *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972) (noting that if the government could take adverse action based on an individuals' First Amendment activity, "his exercise of those freedoms would in effect be penalized and inhibited"). Retaliation puts a person to the intolerable choice of speaking out and facing personal jeopardy on the one hand, and refraining from protected speech and advocacy on the other. Faced with that choice, all but the most courageous individuals will

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[2] We acknowledge that under this Court's decision in *Hartman* v. *Moore*, 547 U.S. 250 (2006), courts are already precluded from analyzing the government's motive in retaliatory *prosecution* cases where probable cause existed. But as petitioner explains (Pet. 25-30), *Hartman*'s holding was based on considerations unique to prosecution claims.

refrain from speaking—undermining the "uninhibited, robust, and wide-open" debate on public issues that the First Amendment protects above all else. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (noting that public debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

Retaliatory *arrest*, moreover, is one of the most fearsome tools for reprisal available to the government. As petitioner points out, it is often easy for the government to find a legal pretext on which to arrest someone who has become politically troublesome. Pet. 16-17. For example, the offense that was ultimately put forth as the basis for petitioner's arrest—"disturbing a lawful assembly"—requires only that a person act with reckless disregard for whether his or her conduct "impede the successful functioning of the assembly." Pet. App. 61a. That vague standard could sweep up virtually anyone who speaks passionately on an issue or proposed measure at a local government meeting.

Beyond the confines of city hall, moreover, state and local statute books are filled with prohibitory statutes that residents honor principally in the breach and that might serve as bases for a retaliatory arrest. To cite just one set of examples, the average Floridian could likely be arrested for at least one moving violation during *every* trip in his or her car, including:

- Speeding by any amount over a posted speed limit (Fla. Stat. § 316.183);
- Turning or changing lanes without signaling (*id.* § 316.155(1));

- Parking more than 12 inches from the curb (*id.* § 316.195);
- Making an U-turn in the presence of a sign prohibiting U-turns (*id.* § 316.1515);
- Failing to stop in advance of "a clearly marked stop line" (*id.* § 316.123(2)(a));
- Driving with a broken tail light (*id.* § 316.221-(1)); or
- Following another vehicle "more closely than is reasonable and prudent." *Id.* § 316.0895(1).

Laws such these are not ordinarily enforced with anything approaching regularity, but they would provide a ready basis for arresting a person targeted for official retaliation.

And once an arrest is made—even for a trivial offense—the potential consequences are serious:

> A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief. The arrestee is subject to a full search of her person and confiscation of her possessions. * * * The arrestee may be detained for up to 48 hours without having a magistrate determine whether there in fact was probable cause for the arrest. Because people arrested for all types of violent and nonviolent offenses may be housed together awaiting such review, this detention period is potentially dangerous. And once the period of custody is over, the fact of the arrest is a permanent part of the public record.

Atwater v. *City of Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting) (citations omitted);

id. at 346 (majority opinion) (acknowledging that, at a minimum, custodial arrests present the opportunity for "gratuitous humiliation[]" of the arrestee). Thus, if government actions such as termination from a job or denial of a benefit chill First Amendment activity, *a fortiori* retaliatory arrests will have that effect.

Given the potency of retaliatory arrest as a means of political retribution, it is clear that a probable-cause bar will have a profound chilling effect on First Amendment activity. That is so for two reasons. First, as we have shown, by effectively precluding governmental liability for retaliatory arrest as long as probable cause is present, the bar ensures that many instances of unlawful retaliation will go unredressed. And second, by making it much harder to prove a claim for retaliatory arrest than for other retaliatory conduct, the bar encourages the government to retaliate by way of arrests, rather than other means.

The facts of this case prove the point. Had the city acted against petitioner in virtually any other way, petitioner's retaliation claim would have been evaluated under the *Mt. Healthy* standard, and petitioner might have prevailed. But because petitioner's claim was for retaliatory *arrest*, it was doomed to failure unless he could show the absence of probable cause. In other words, the city was better off having arrested petitioner than it would have been if it took virtually any other retaliatory action. The lesson will not be lost on other local governments seeking to silence nettlesome political activists.

The chilling effect of an increase in retaliatory arrests will be particularly felt by those who, like petitioner, might wish to speak out at city council or

other local government meetings. Although public meetings provide citizens the opportunity to meet face to face with government officials and express their views, they face a heightened risk that, in the process of doing so, they will become known to officials and incur their displeasure. And if those officials elect to order the arrest of a person who speaks out, they have numerous potential bases for doing so before a meeting even concludes: during the events of this case, the city cited *three* different offenses as the grounds for petitioner's arrest at the city council meeting, including one (disturbing an assembly) that it failed to identify until during the trial, eight years after the fact. See Pet. 8.

The prospect of this kind of reprisal will surely deter many would-be activists from speaking out on public issues. As explained above, a large number of people concerned about local government policies are political novices who find public advocacy daunting. If they believe that officials can retaliate against them by ordering pretextual arrests, these individuals will either censor their political speech or refrain from speaking altogether—to their own detriment and to the detriment of the community that is deprived of hearing their views. The First Amendment cannot abide that result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JOINT APPENDIX

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH)

Lozman v. City of Riviera Beach, et al.
Civil Case No. #: 9:08-cv-80134-DTKH

RELEVANT DOCKET ENTRIES

#	Date	Docket Text
1	02/08/2008	COMPLAINT against all defendants Filing fee $ 350. Receipt#: 723714, filed by Fane Lozman. (mg) (Entered: 02/11/2008)
42	11/08/2010	Renewed MOTION to Reopen Case by Fane Lozman. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C) (Bowling, Robert) (Entered: 11/08/201
70	10/12/2011	ORDER OF FINAL DISMISSAL WITH PREJUDICE & CLOSE-OUT. Signed by Judge Daniel T. K. Hurley on 10/12/11. (lr) (Entered: 10/12/2011)
149	06/11/2013	MANDATE of USCA, we REVERSE the district court's dismissal of Appellant's amended complaint and remand for further proceedings not inconsistent with this opinion as to 72 Notice of Appeal, filed by Fane Lozman; Date Issued: 6/11/13; USCA Case

		Number: 11-15448-CC (hh) (Entered: 06/11/2013)
151	07/02/2013	ORDER Setting Trial Date & Discovery Deadlines, Referring Case to Mediation & Referring Discovery to United States Magistrate Judge: (Jury Trial set for 3/3/2014 before Judge Daniel T. K. Hurley., Calendar Call set for 2/20/2014 08:30 AM in West Palm Beach Division before Judge Daniel T. K. Hurley Signed by Judge Daniel T. K. Hurley on 7/2/2013. (cbr) (Entered: 07/03/2013)
175	10/01/2013	ANSWER and Affirmative Defenses to Complaint with Jury Demand re Amended Complaint [42-1] by City of Rivieria [sic] Beach. (Bedard, Benjamin) (Entered: 10/01/2013)
217	11/18/2013	MOTION for Leave to File a Second Amended Compalint [sic] and Incorporated Memorandum of Law by Fane Lozman. (Attachments: # 1 Exhibit 1-Second Amended Complaint, # 2 Exhibit 2, # 3 Exhibit 3)(asl) (Entered: 11/18/20
218	11/21/2013	VACATED by DE# 266 . ORDER granting 217 Motion for Leave to File Second Amended Complaint. Plaintiff must separately re-file

		the Amended Complaint within 3 days, expedite service of process and file executed returns by December 4, 2013. Previously named defendants shall respond to Second Amended Complaint by December 4, 2013. Signed by Judge Daniel T. K. Hurley on 11/21/13. (lr) Modified to reflect "vacated" on 12/27/2013 (wc).(Entered: 11/21/2013)
222	11/22/2013	STRICKEN by DE# 266. SECOND AMENDED COMPLAINT against Michael Brown, George Carter, City of Riviera Beach, Norma Duncombe, Ann Iles, Vanessa Lee, Gloria Shuttlesworth, Elizabeth Wade, Dawn Pardo, Cedrick Thomas, Judy Davis, Bruce Guyton, Riviera Beach Community Redevelopment Agency filed in response to Order Granting Motion for Leave, filed by Fane Lozman. (asl) Modified to add defendant on 11/22/2013 (asl). Modified to reflect "stricken" on 12/27/2013 (wc). (Entered: 11/22/2013)
244	12/10/2013	ANSWER and Affirmative Defenses to Complaint with Jury Demand re Second Amended Complaint [DE 222] by Riviera Beach Community

		Redevelopment Agency. Attorney Benjamin Lawrence Bedard added to party Riviera Beach Community Redevelopment Agency (pty:dft). (Bedard, Benjamin) (Entered: 12/10/2013
325	01/17/2014	Order Granting Plaintiff's Oral Motion to file attached SECOND AMENDED COMPLAINT against City of Riviera Beach. (lr) Modified on 1/17/2014 (to reflect Second Amended Complaint (lr). (Entered: 01/17/2014)
329	01/27/2014	ANSWER and Affirmative Defenses to Amended Complaint with Jury Demand by City of Riviera Beach. (Bedard, Benjamin) (Entered: 01/27/2014)
519	08/19/2014	ORDER DENYING IN PART AND GRANTING IN PART 383 DEFENDANT'S MOTION FOR SUMMARY JUDGMENT & DENYING 408 PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT. Signed by Judge Daniel T. K. Hurley on 8/19/14. (lr) (Entered: 08/19/2014)
666	11/04/2014	ORDER Granting in part and Denying in part 557 Defendant's Motion in Limine to Exclude Evidence Relating to Admiralty Proceeding, Arrest and Seizure of

		Floating Home & Damages to Floating Home. Signed by Judge Daniel T. K. Hurley on 11/4/14. (lr) (Entered: 11/04/2014)
728	12/17/2014	JURY VERDICT. (cbr) (Entered: 12/17/2014)
729	12/18/2014	TRANSCRIPT of Jury Trial held on 12/3/2014 before Judge Daniel T. K. Hurley, 168 pages, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/12/2015. Redacted Transcript Deadline set for 1/23/2015. Release of Transcript Restriction set for 3/23/2015. (gbx) (Entered: 12/18/2014)
731	12/18/2014	FINAL JUDGMENT in favor of City of Rivieria Beach against Fane Lozman. Signed by Judge Daniel T. K. Hurley on 12/18/14. (lr) (Entered: 12/18/2014
732	12/19/2014	Jury Notes, Court Jury Instruction and Seating Chart (dj) (Entered: 12/19/2014)

737	01/12/2015	Rule 59(a)(1)(A) MOTION for New Trial, MOTION to Reassign Case by Fane Lozman. (ls) (Entered: 01/13/2015)
748	02/06/2015	Notice of Appeal as to 659 Order Adopting Report and Recommendations, 281 Order on Motion to Disqualify Judge, 739 Order on Motion for New Trial, 731 Judgment by Fane Lozman. Filing fee $ 505.00 Receipt #: 94457. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (hh) (Entered: 02/09/2015)
768	05/12/2015	TRANSCRIPT of Trial Day 1 held on 11-12-2014 before Judge Daniel T. K. Hurley, Volume Number 1 of 19, 1-298 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber

		before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)
769	05/12/2015	TRANSCRIPT of Trial Day 2 held on 11-13-2014 before Judge Daniel T. K. Hurley, Volume Number 2 of 19, 1-260 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)
770	05/12/2015	TRANSCRIPT of Trial Day 3 held on 11-17-2014 before Judge Daniel T. K. Hurley, Volume Number 3 of 19, 1-267 pages, re:

		748 Notice of Appeal,, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)
771	05/12/2015	TRANSCRIPT of Trial Day 4 held on 11-18-2014 before Judge Daniel T. K. Hurley, Volume Number 4 of 19, 1-240 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript

		Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)
772	05/12/2015	TRANSCRIPT of Trial Day 5 held on 11-20-2014 before Judge Daniel T. K. Hurley, Volume Number 5 of 19, 1-296 pages, re: 748 Notice of Appeal,, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)
773	05/12/2015	TRANSCRIPT of Trial Day 6 held on 11-24-2014 before Judge Daniel T. K. Hurley, Volume Number 6 of 19, 1-302 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the

court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)

774 05/12/2015 TRANSCRIPT of Trial Day 7 held on 11-25-2014 before Judge Daniel T. K. Hurley, Volume Number 7 of 19, 1-230 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov.
Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)

775	05/12/2015	TRANSCRIPT of Trial Day 8 held on 11-26-2014 before Judge Daniel T. K. Hurley, Volume Number 8 of 19, 1-122 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015
776	05/12/2015	TRANSCRIPT of Trial Day 9 held on 12-1-2014 before Judge Daniel T. K. Hurley, Volume Number 9 of 19, 1-269 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of

Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)

777 05/12/2015 TRANSCRIPT of Trial Day 10 held on 12-2-2014 before Judge Daniel T. K. Hurley, Volume Number 10 of 19, 1-249 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)

778 05/12/2015 TRANSCRIPT of Trial Day 11 held on 12-3-2014 before Judge Daniel T. K. Hurley, Volume Number 11 of 19, 1-226 pages, re: 748 Notice of Appeal, Court

		Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)
779	05/12/2015	TRANSCRIPT of Trial Day 12 held on 12-4-2014 before Judge Daniel T. K. Hurley, Volume Number 12 of 19, 1-214 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015.

		Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)
780	05/12/2015	TRANSCRIPT of Trial Day 13 held on 12-8-2014 before Judge Daniel T. K. Hurley, Volume Number 13 of 19, 1-278 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)
781	05/12/2015	TRANSCRIPT of Trial Day 14 held on 12-9-2014 before Judge Daniel T. K. Hurley, Volume Number 14 of 19, 1-263 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or

purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)

782 05/12/2015 TRANSCRIPT of Trial Day 15 held on 12-10-2015 before Judge Daniel T. K. Hurley, Volume Number 15 of 19, 1-267 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov.
Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)

783 05/12/2015 TRANSCRIPT of Trial Day 16 held on 12-11-2014 before Judge

Daniel T. K. Hurley, Volume Number 16 of 19, 1-207 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)

784 05/12/2015 TRANSCRIPT of Trial Day 17 held on 12-12-2014 before Judge Daniel T. K. Hurley, Volume Number 17 of 19, 1-141 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through

PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)

785 05/12/2015 TRANSCRIPT of Trial Day 18 held on 12-15-2014 before Judge Daniel T. K. Hurley, Volume Number 18 of 19, 1-230 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)

786 05/12/2015 TRANSCRIPT of Trial Day 19 held on 1212-16-2014 before Judge Daniel T. K. Hurley, Volume Number 19 of 19, 1-62 pages, re: 748 Notice of Appeal, Court Reporter: Gizella Baan-Proulx, 305-523-5294 / Gizella

		Baan-Proulx@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/5/2015. Redacted Transcript Deadline set for 6/15/2015. Release of Transcript Restriction set for 8/13/2015. (gbx) (Entered: 05/12/2015)
805	09/11/2015	NOTICE of Filing Trial Exhibits for Purposes of Appeal by Fane Lozman (cbr) (Main Document 805 replaced on 9/16/2015) (vp). (Entered: 09/14/2015)
820	01/18/2016	NOTICE by City of Rivieria Beach of Filing Trial Exhibits for Purposes of Appeal (Attachments: # 1 Exhibit Exhibits 1-8, # 2 Exhibit Exhibit 9, # 3 Exhibit Exhibit 10, # 4 Exhibit Exhibit 11, # 5 Exhibit Exhibit 12) (Bedard, Benjamin) (Entered: 01/18/2016)

U.S. COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Fane Lozman v. City of Riviera Beach, et al.
Case No. 15-10550

RELEVANT DOCKET ENTRIES

#	Date	Docket Text
BL-1	02/09/2015	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant Fane Lozman on 02/06/2015. Fee Status: Fee Paid.
BL-24	09/21/2015	Appellant's brief filed by Fane Lozman. (ECF: Raymond Taseff)
BL-40	01/20/2016	Appellee's Brief filed by Appellee City of Riviera Beach. (ECF: Benjamin Bedard)
BL-52	03/01/2016	Reply Brief filed by Appellant Fane Lozman. (ECF: Raymond Taseff)
BL-59	02/28/2017	Judgment entered as to Appellant Fane Lozman.
BL-60	02/28/2017	Opinion issued by court as to Appellant Fane Lozman. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam. The opinion is also available through the Court's Opinions

page at this link <ahref= "http://www.ca11. uscourts.gov/opinions"> http://www.ca11.uscourts.gov/ opinions

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

FANE LOZMAN,

Plaintiff,

vs.

CITY OF RIVIERA BEACH, a Florida municipal corporation, ~~MICHAEL BROWN, an individual, GLORIA SHUTTLESWORTH, an individual, NORMA DUNCOMBE, an individual, VANESSA LEE, a[n] individual, ELIZABETH WADE, an individual, ANN ILES, an individual, and GEORGE CARTER, an individual,~~

Defendants.

Case No. 08-80134-CIV-HURLEY/HOPKINS

[STAMP: FILED NOV 22 2013]

SECOND AMENDED COMPLAINT[1]

Plaintiff, FANE LOZMAN ("LOZMAN") sues defendants, CITY OF RIVIERA BEACH ("CITY"), ~~MICHAEL BROWN in his individual capacity, GLORIA SHUTTLESWORTH in her individual capacity, NORMA DUNCOMBE in her individual capacity, VANESSA LEE in her individual capacity, ELIZABETH WADE in her individual capacity, ANN~~

[1] This is the version of the Second Amended Complaint, as accepted by order of the court on January 17, 2014 (ECF 325). The strikeouts reflect material that was deleted. Boldfaced material within the complaint reflects wording that was handwritten onto the document.

~~ILES in her individual capacity, GEORGE CARTER in his individual capacity, CEDRICK THOMAS in his individual capacity, BRUCE GUYTON in his individual capacity, and the RIVIERA BEACH COMMUNITY REDEVELOPMENT AGENCY ("CRA")~~ and alleges as follows:

Nature of the Case

This action for money damages is brought pursuant to 42 U.S.C. Sections 1983, the First, Fourth and Fourteenth Amendments to the United States Constitution, and under the laws of the State of Florida against the City of Riviera Beach ~~and former and current city officials.~~ :

1. This action is brought by FANE LOZMAN, a civic activist, against the CITY~~, CRA and its public officials~~ who used the power of ~~their~~ **its** office to retaliate against LOZMAN for his advocacy criticizing the CITY, the CRA, and their respective policies. In an effort to silence and discredit LOZMAN, the CITY and the CRA through its city administration and police department waged a campaign against LOZMAN which included false arrest, threats, retaliation and intimidation. These actions were taken to silence LOZMAN and to punish him for exercising his First Amendment rights.

Jurisdiction and Venue

2. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1331(a) and 42 U.S.C. § 1983, as well as principles of supplemental jurisdiction under 28 U.S.C. § 1367.

3. This action is brought before the Court in the Southern District of Florida pursuant to 28 U.S.C.

§1391(b) and at the West Palm Beach, Florida, Division of the Southern District pursuant to Local Rules 3.1(F) and 3.4(D) S.D. Fla. Local Rules.

Parties

4. LOZMAN was a resident who lived on his floating home at the City of Riviera Beach marina, in Palm Beach County, Florida.

5. The CITY is a municipal corporation in Palm Beach County, Florida.

6. The governing body of the CITY is its City Council, and all powers of the CITY and the determination of all matters of policy are vested in the City Council.

~~7. Defendant MICHAEL BROWN was at material times the Mayor of the City.~~

~~8. Defendants NORMA DUNCOMBE, VANESSA LEE, ELIZABETH WADE, ANN ILES, DAWN PARDO, CEDRICK THOMAS, and BRUCE GUTON are or were council members of RIVIERA BEACH at material times.~~

~~9. Defendant GLORIA SHUTTLESWORTH is or was at material times the Assistant City Manager. Defendant GEORGE CARTER is or was at material times the Marina Director of RIVIERA BEACH.~~

~~10. Defendant CRA, has as its governing body the same elected City Councilpersons of the CITY.~~

General Allegations

11. In 2006, LOZMAN moved to the CITY. He was the owner of a floating residential structure, which was his registered homestead, at 200 East 13th Street, Marina Slip # 452 Riviera Beach, Florida.

12. LOZMAN leased the boat slip for this floating home from the CITY Municipal Marina.

13. Shortly after LOZMAN moved into the CITY marine in March of 2006, LOZMAN became aware of CITY's planned re-development project.

14. The redevelopment plan proposed the taking of thousands of homes (and many businesses) through the power of eminent domain and giving them, along with the CITY marina, to a private developer for a proposed 2.4 billion dollar redevelopment project.

15. LOZMAN made public comments against both the initial 2006 redevelopment plan and two subsequent plans in 2008 and 2011, along with the corruption he perceived in the CITY government at various CITY Council and Community Redevelopment Agency (CRA) public meetings between April 2006 to November 2013.

16. LOZMAN was removed by the police from a regularly scheduled meeting of the CITY Council while speaking from the podium during the public comments portion of the meeting on May 10, 2006.

17. LOZMAN was then denied access to a special meeting of the CITY Council following the regularly scheduled CRA meeting preceding it on May 10, 2006.

18. The morning after the May 10 special meeting, on May 11, 2006, Florida Governor Jeb Bush signed into law H.B. 1567, which signified a comprehensive overhaul of Florida's eminent domain laws. Section 73.013 et sq. of the Florida Statutes prohibits the use of eminent domain in the manner the CITY and CRA proposed for its redevelopment plan.

19. On June 7, 2006, LOZMAN filed a lawsuit against the CITY, MICHAEL BROWN, NORMA

DUNCOMBE, VANESSA LEE, ELIZABETH WADE, and ANN ILES, alleging a violation of the Government-in-the-Sunshine Law.

20. On June 28, 2006, the CITY held a scheduled closed executive session. This meeting was recorded and the transcript of this proceeding has now been made a public record. At this meeting, CITY officials discussed the Sunshine lawsuit brought by LOZMAN and the need to do "whatever we deem necessary" in the defense of that suit, including "background investigation on Lozman," the intimidation of Lozman, and the hiring of a private investigator to determine who was "funding" LOZMAN's Sunshine lawsuit. In addition, the CITY wanted to investigate LOZMAN to determine whether he was connected with an entity called the Pacific Legal Foundation, the Governor, the Attorney General's office, the legislature and local citizens that the CITY perceived as being opposed to the proposed re-development by the CITY. LOZMAN's Sunshine lawsuit had been publicly supported by comments from Governor Bush and Speaker of the House Bense to the media. Their offices along with the Attorney General's office, cooperated with LOZMAN's attorneys who prepared the Sunshine lawsuit.

21. Thereafter, LOZMAN continued attending public meetings in Riviera Beach and continued to express his views during the public portion of such meetings. However, the CITY, through its CITY Council, its various subdivisions and its individual employees, embarked on a campaign of harassment and retaliation against LOZMAN for the purpose of punishing LOZMAN for exercising his right of free speech and right to petition the government for

redress of grievances and intimidating LOZMAN in an effort to deter him from exercising such rights in the future.

~~22. Theconductof Defendants, MICHAEL BROWN, GLORIA SHUTTLESWORTH, NORMA DUNCOMBE, VANESSA LEE, ELIZABETH WADE, ANN ILES, GEORGE CARTER, DAWN PARDO, CEDRICK THOMAS, JUDY DAVIS and BRUCE GUYTON, as alleged herein, involved reckless and callous indifference to LOZMAN's First Amendment right to petition the government and exercise his right of freedom of speech without retaliation.~~

23. The CITY Council members in 2006 (MICHAEL BROWN, DUNCOMBE, LEE, and ELIZABETH WADE) had directed CITY employees and CITY police officers, to find means of harassing and retaliating against LOZMAN. GEORGE CARTER took the lead in carrying out that directive in 2006.

24. The harassment and retaliation resulted in LOZMAN's arrest in November 2006. On November 15, 2006, during the public comments portion of the CITY council meeting, LOZMAN calmly approached the podium and began making his comments. Unhappy with his comments in the U.S. Attorney's efforts to rack down on public corruption in Palm Beach County, the CITY, with the tacit approval of all of its elected officials, and at the specific direction of ELIZABETH WADE, instructed law enforcement officers to arrest LOZMAN and remove him from the meeting. LOZMAN was handcuffed while still making his public comments, thus depriving him of his rights guaranteed by the First Amendment and his rights to attend a public meeting as set forth in Florida's

Sunshine Law. The entire incident was caught on videotape.

25. LOZMAN was dragged to the CITY police department, with his hands handcuffed behind his back, where he was locked up in a holding cell.

26. The CITY claimed that LOZMAN was arrested for disorderly conduct, trespassing, and resisting arrest without violence. These charges were nolle prossed by the Palm Beach County State Attorney on January 17, 2007.

27. The campaign of harassment and retaliation against LOZMAN did not cease after his 2006 arrest. LOZMAN continued to attend public CITY meetings and was i) removed from numerous meetings by the CITY police; ii) physically grabbed by the CITY police while LOZMAN was making his public comments at the speakers podium and told to sit down; iii) physically thrown by the CITY police to the CITY Council chambers floor at the specific direction of DAWN PARDO, while LOZMAN was making his public comments at the speakers podium; and iv) regularly interrupted and threatened with police force (ANN ISLES, ELIZABETH WADE, DAWN PARDO, CEDRICK THOMAS) in an attempt to censor LOZMAN's public comment.

28. The acts constituting harassment and retaliation by the Defendants included:

a. Agreeing to intimidate LOZMAN into dismissing; his Government- in-the-Sunshine lawsuit during the June 28, 2006, executive session. The meeting was not attended by GEORGE CARTER and GLORIA SHUTTLESWORTH. DAWN PARDO,

CEDRICK THOMAS, JUDY DAVIS, and BRUCE GUYTON were not elected officials in 2006.

b. Agreeing to hire a private investigator to investigate and/or follow LOZMAN during the June 28, 2006 executive session. This meeting was not attended by GEORGE CARTER and GLORIA SHUTTLESWORTH. DAWN PARDO, CEDRICK THOMAS, JUDY DAVIS, and BRUCE GUYTON were not elected officials in 2006.

c. Constantly censoring LOZMAN's public comments at CITY Council and CRA meetings on issues ranging from three different re-development plans for the CITY marina, allegations of corruption involving elected officials of the CITY, the misconduct and incompetence of key CITY employees and other issues of public concern.

d. A few of the latest examples of LOZMAN being censored while making public comments at CITY Council meetings include: i) on November 6, 2013, DAWN PARDO had a City police officer remove LOZMAN from the speaker podium prior to his 3 minute allocated time for public comment had expired; ii) on October 16, 2003, CEDRICK THOMAS stated from the dais that LOZMAN did not have a First Amendment right to make public comments that dealt with official records, as recorded by the Palm Beach County Clerk, of an elected official because they portrayed this elected official in a negative light; and iii) during the November 13, 2013 CRA meeting, Lozman was called a "Rapist, Cross Dressing, Fag, Piece of Shit" by BRUCE GUYTON in a vile, disgusting, and slanderous attempt to intimidate LOZMAN into not making his public comments, and/or provoking LOZMAN into a physical confrontation.

BRUCE GUYTON has a history of violence, mental instability, DUI, and illegal drug use. BRUCE GUYTON had been involuntarily committed by State Court Judge Diana Lewis, Mental Health Court, in Case No. 501996MH000389XXMAIB.

e. Arresting LOZMAN for disorderly conduct, trespassing, and resisting arrest without violence on November 15, 2006, while LOZMAN was speaking during the public comment portion of a CITY council meeting;

f. Publicly stating that LOZMAN does not have a First Amendment right to speak while he was speaking during the public comment portion of a City Council meeting on or about January 3, 2007, along with many additional meetings up to and including the November 6, 2013 CITY council meeting.

g. Causing LOZMAN to be physically removed by the CITY Police, during CITY Council or CRA public meetings, from the CITY Council Chambers, the CITY Hall building, or the Public Speakers Podium. These removals occurred on numerous occasions between 2006 to 2013. The police were directed to remove LOZMAN by the CITY Council Chairpersons (or acting Chairperson), to include LIZ WADE, ANN ISLES, CEDRICK THOMAS and DAWN PARDO. There was also an occasion where GLORIA SHUTTLESWORTH directed that a police officer remove LOZMAN from a CITY Council meeting.

h. On October 21, 2009, LOZMAN suffered a painful physical injury to his previously repaired hip socket and pelvis (there are a number of screws and plate in it from an injury sustained prior to LOZMAN moving to the CITY), after he was thrown on the CITY

Council Chambers floor by two Riviera Beach police officers at the Direction of the CITY Council Chairperson DAWN PARDO. The CITY Council and CITY attorney Pamala Ryan laughed as Lozman lay on the floor in pain. LOZMAN required a visit to the Emergency Room where his injury was diagnosed, he was provided pain medication, and he used crutches until his injury healed.

i. Constantly censoring LOZMAN's comments at public meetings of the CITY Council and Community Redevelopment Agency from 2006 through the present.

j. Filing a sham federal admiralty action that culminated in the seizure and subsequent destruction by the CITY of LOZMAN's floating residence at the CITY Marina. The U.S. Supreme Court reversed the lower courts and ruled that Lozman's floating home was illegally seized by the CITY because it was not a vessel subject to Federal Admiralty jurisdiction.

k. Illegally conducting a self-help eviction, by turning off LOZMAN's electricity to his floating home between April 1, 2009 to April 20, 2009.

l. Ignoring State Court Judge Peter Evan's order of April 17, 2009, to restore the electricity to LOZMAN's floating home.

m. Repeatedly harassing LOZMAN by having City marina employee Pierre Smith go to LOZMAN's floating home and take pictures through the window of LOZMAN, and sometimes Lozman and his female companion, in various stages of undress.

n. Repeatedly having the CITY police harass and threaten LOZMAN when he would walk his small dachshund on a lease around the CITY marina; and

o. Illegally turning off the electricity to friends of LOZMAN's who resided on their personal vessels at the CITY marina. The City did this in a selective manner, because the electricity was not turned off to other tenants' vessels.

COUNT I – 42 U.S.C. § 1983 AGAINST DEFENDANTS CITY OF RIVIERA BEACH, CRA AND THE INDIVIDUAL DEFENDANTS (SHUTTLESWORTH, DUNCOMBE, LEE, WADE, ILES, CARTER, PARDO, THOMAS, DAVIS AND GUYTON) FOR POLICY TO RETALIATE AGAINST LOZMAN AND TO SUPPRESS SPEECH

29. This is an action for injunctive relief and for damages under Title 42, U.S.C. § 1983.

30. The allegations of paragraphs 1 through 28 are incorporated by reference into this Count and are re-alleged as if fully set forth herein.

31. LOZMAN has a right to petition the government under the First Amendment of the Constitution of the United States of America, a right to exercise free speech at public meetings, and a right to be free from unreasonable seizures under the Fourth Amendment, as applied to the states through the Fourteenth Amendment.

32. LOZMAN's rights to petition the government and exercise free speech includes the right to engage in these constitutionally protected acts without fear of retaliation by the government against him.

33. The CITY, through its Council Members, determined that the CITY should retaliate against LOZMAN for his exercise of his right to petition the government and right to free speech.

34. The CITY, through its Council Members acting for itself and by direction to its subordinate boards, inspectors, officers and employees, has commenced an intentional campaign to harass and intimidate LOZMAN.

35. At all times alleged in this Count, the CITY and its individual Council Members, board members, inspectors, officers and employees acted under color of state law and in the effectuation of the policies of the Council Members.

36. Defendants deprived LOZMAN of rights secured to him under the First and Fourth Amendments of the Constitution of the United States of America, including LOZMAN's right to petition the government for redress of grievances and his right to speak out freely on public issues, and to be free from unreasonable seizures.

37. Defendants accomplished this deprivation by harassing and retaliating against LOZMAN, with LOZMAN being personally arrested twice. LOZMAN'S floating home was also arrested and destroyed by the CITY in a sham federal admiralty action. The conduct comprising the deprivation of LOZMAN's constitutional rights include but are not limited to, the conduct alleged in paragraphs 1 to 36 above.

38. THE CITY intended by each of these actions to punish and retaliate against LOZMAN for exercising his First Amendment Rights and to deter LOZMAN and others from exercising such rights in the future.

39. This policy to punish and silence LOZMAN for his public criticism of the CITY, its elected official's, [sic] and key employees was designed and carried out

by the CITY as a governmental entity, and by the individual CITY policy makers at the highest level, with the purpose of stopping and punishing LOZMAN from engaging in constitutionally protected political speech.

40. Each of the actions set forth in paragraph 1 to 28 of this Second Amended complaint was taken pursuant to a custom, policy, or decision made by a governmental official with final policymaking authority.

41. As a result of the CITY's campaign to harass, retaliate and punish LOZMAN, LOZMAN has been deprived of his right to petition the government and exercise free speech as secured under the First Amendment to the Constitution of the United States of America free from retaliation, and his right to be free from unreasonable seizures.

42. As a result of the CITY's campaign to harass, retaliate and punish LOZMAN, LOZMAN has been deprived of both substantive and procedural due process guaranteed under the Fourteenth Amendment of the Constitution of the United States of America.

43. As a result of the CITY's campaign to harass, retaliate and punish LOZMAN, LOZMAN has been deprived of equal protection guaranteed under the Fourteenth Amendment of the Constitution of the United States of America by virtue of the CITY's discriminatory and disparate treatment of LOZMAN in the application of its policies, procedures, regulations, ordinances and other laws.

44. As result of the actions and conduct of defendants, LOZMAN has no adequate remedy at law and is suffering irreparable injury as a result of the

CITY's ongoing campaign to harass him, which injury cannot be redressed in the absence of a permanent and mandatory injunction requiring the CITY to end its campaign of intentional harassment and retaliation against LOZMAN in response to LOZMAN's exercise of his rights of free speech and to petition the CITY for the redress of grievances.

45. The acts of Defendants described above were maintained under color of the law of the State of Florida and under the color of the individual Defendants respective offices as officers and agents of the State of Florida and of the CITY.

~~46. Each of the individual Defendants organized, conspired, or participated in the intentional scheme to punish and retaliate against LOZMAN for LOZMAN having exercised the right to petition the government for the redress of grievances and the right of free speech.~~

~~47.~~ The acts of the individual Defendants was so obviously wrong in the light of preexisting law, that these public officials knowingly violated the law, because they had knowledge of the law and took an oath to uphold it.

48. LOZMAN has suffered damage as a result of Defendant's violations of his Civil Rights, including:

a. Injury to his person that was sustained after being thrown on the floor by two police officers, at the direction of PARDO, while Lozman was making public comments;

b. Intentional infliction of emotional distress, and mental anguish that resulted and were limited to the specific events of: i.) being physically thrown around by the CITY police while making public

comments at CITY Council and CRA meetings; ii) the false arrest of Lozman while he was making public comments at a CITY Council meeting; iii) the stress of being harassed by the police and threatened with arrest while LOZMAN walked his dog; iv) receiving repeated death threats in front of his floating home by current CITY employee Sylvia Blue who was escorted to the secure dock where Lozman's floating home was moored by a CITY marina employee; v) receiving repeated death threats at CITY hall current CITY employee Sylvia Blue; vi) being physically threatened and slandered by GUYTON; and vii) the CITY's retaliatory Federal admiralty arrest and the CITY's subsequent purchase and then the vindictive destruction of Lozman's floating home. The intentional infliction of emotional distress and mental anguish that resulted from the above specific incidents, although significant during the time these events occurred, has been cured by the passage of time and has resulted in no permanent impairment;

c. Damages for the destruction of LOZMAN'S floating home, furniture and related contents as a result of ~~Defendants~~ PARDO, THOMAS and DAVIS wrongful actions.

d. Attorneys' fees and costs incurred by LOZMAN as a result of and in response to Defendants' deprivation of LOZMAN's civil rights.

e. Attorneys' fees and costs incurred by LOZMAN in response to each individual wrongful act committed by Defendants in furtherance of the CITY's overall scheme to harass, retaliate against, intimidate, and punish LOZMAN.

f. Attorney's fees and costs incurred by LOZMAN at the district, appellate, and U.S. Supreme Court in the related admiralty action.

~~g. The intentional, willful and wanton acts of Defendants BROWN, SHUTTLESWORTH, DUNCOMBE, LEE, WADE, ISLES, CARTER, PARDO, THOMAS, DAVIS, and GUYTON establish a claim for punitive damages against Defendants BROWN, SHUTTLESWORTH, DUNCOMBE, LEE, WADE, ISLES, CARTER, PARDO, THOMAS, DAVIS, and GUYTON.~~

49. LOZMAN had previously employed the law firm of Cobb and Cole to pursue this action and has contracted to pay a reasonable attorneys' fee, for which fees and the costs of this action, LOZMAN is liable under the provisions of Title 42 U.S.C. § 1988.

50. All conditions precedent to the filing of this action has occurred or has been waived.

~~COUNT II – CONSPIRACY TO VIOLATE CIVIL RIGHTS~~

~~(Against Defendants BROWN, SHUTTLESWORTH, DUNCOMBE, LEE, WADE, ILES, PARDO, THOMAS, DAVIS, and GUYTON)~~

~~51. This cause of action is brought by LOZMAN against Defendants MICHAEL BROWN, GLORIA SHUTTLESWORTH, NORMA DUNCOMBE, VANESSA LEE, ELIZABETH WADE, ANN ILES, DAWN PARDO, CEDRICK THOMAS, JUDY DAVIS, and BRUCE GUYTON in their individual and official capacities, for conspiracy to interfere with LOZMAN's constitutional right of free speech as guaranteed by the First Amendment to the United States Constitution.~~

52. Defendants MICHAEL BROWN, GLORIA SHUTTLESWORTH, NORMA DUNCOMBE, VANESSA LEE, ELIZABETH WADE, ANN ILES, DAWN PARDO, CEDRICK THOMAS, JUDY DAVIS, and BRUCE GUYTON entered into an agreement to silence, discredit, and punish LOZMAN in retaliation for speaking critically about the CITY and CITY leaders. Such actions were taken while said Defendants were acting under the color of law as CITY officials and policy makers of the CITY and CRA. The conspiracy was effectuated by Defendants agreeing to use their power and authority as CITY and CRA officials (excluding MICHAEL BROWN, who was not a CRA official, but was a CITY official CITY) to gather, disclose and allow the distribution of false information about LOZMAN with the purpose of retaliating against LOZMAN and punishing him, and preventing LOZMAN from further engaging in constitutionally protected speech critical of the CITY, CRA, CITY officials, and CRA officials.

a. As a direct and proximate consequence of the conspiracy between Defendants MICHAEL BROWN, GLORIA SHUTTLESWORTH, NORMA DUNCOMBE, VANESSA LEE, ELIZABETH WADE, ANN ILES, DAWN PARDO, CEDRICK THOMAS, JUDY DAVIS, and BRUCE GUYTON, LOZMAN sustained injury, physical pain and discomfort, emotional distress and mental suffering that have been cured by the passage of time and have resulted in no permanent impairment.

53. The intentional, willful and wanton acts of Defendants MICHAEL BROWN, GLORIA SHUTTLESWORTH, NORMA DUNCOMBE, VANESSA LEE, ELIZABETH WADE, ANN ILES,

~~DAWN PARDO, CEDRICK THOMAS, JUDY DAVIS, and BRUCE GUYTON establish a claim for punitive damages against Defendants MICHAEL BROWN, GLORIA SHUTTLESWORTH, NORMA DUNCOMBE, VANESSA LEE, ELIZABETH WADE, ANN ILES, DAWN PARDO, CEDRICK THOMAS, JUDY DAVIS, and BRUCE GUYTON.~~

COUNT III - FALSE ARREST

(State Tort of False Arrest against Defendant CITY)

54. This is an action for common-law false arrest.

55. The allegations of paragraphs 1 through 28 are incorporated by reference into this Count and are re-alleged as if fully set forth herein.

56. This is a cause for damages in excess of fifteen thousand dollars, exclusive of costs and attorney's fees.

57. On or about November 15, 2006, LOZMAN was arrested at a CITY Council meeting for speaking during the public comment portion of the meeting.

58. LOZMAN was removed and arrested at the direction of the CITY Councilperson WADE, with the approval of Councilmembers DUNCOMBE and LEE.

59. The CITY, through its police department, intentionally arrested and detained LOZMAN without an arrest warrant and without probable cause in that the CITY knew or had reason to know at the time of his arrest and detention that LOZMAN had not committed any crime.

60. LOZMAN was charged with disorderly conduct, trespassing, and resisting arrest without violence.

61. State prosecutors declined to prosecute LOZMAN.

62. The CITY's detention of LOZMAN was unreasonable and unwarranted by the circumstances in that LOZMAN was a resident of the CITY who was lawfully speaking at a CITY Council Meeting and who had not committed any crime.

63. LOZMAN's arrest was publicized in the CITY and throughout Palm Beach County in print and television coverage.

64. LOZMAN suffered damages as a direct result of the false arrest. The specific damages limited directly to the false arrest are:

a. Physical pain and discomfort, emotional distress and mental suffering that have been cured by the passage of time and have resulted in no permanent impairment.

65. The intentional, willful and wanton acts of WADE, with the approval of Councilmembers DUNCOMBE and LEE, establish a claim for punitive damages against WADE, DUNCOMBE and LEE.

66. All conditions precedent to the filing of this action has occurred or has been waived.

COUNT IV- STATE TORT OF BATTERY AGAINST DEFENDANT CITY OF RIVIERA BEACH

63. LOZMAN realleges paragraphs 1 through 28, and incorporates them by reference herein.

64. This is a cause for damages in excess of fifteen thousand dollars, exclusive of costs and attorney's fees.

65. Defendant CITY is responsible for the conduct of the police officers in its employ.

66. On repeated occasions between 2006 to 2013, including November 15, 2006, and October 21, 2009,

the CITY police, while acting in the course and scope of their duties as police officers employed by Defendant CITY did, without legal justification, batter, touch and strike LOZMAN without the consent of LOZMAN and against LOZMAN's will. These incidents happened during CITY Council and CRA meetings.

67. As a result of such actions, LOZMAN suffered damages that included bodily injury and physical suffering, physical discomfort, which although significant during the time these events occurred, have been cured by the passage of time and has resulted in no permanent impairment.

68. All conditions precedent to the filing of this action has occurred or has been waived.

COUNT V – STATE "INTENTIONAL TORT" OF CONVERSION AGAINST THE CITY ~~and DEFENDANTS DAWN PARDO, CEDRICK THOMAS, AND JUDY DAVIS~~

69. The CITY improperly arrested LOZMAN's floating home to include his furniture and other personal property with the approval of PARDO, THOMAS and DAVIS, on a sham federal admiralty complaint. LOZMAN floating home was towed from the CITY to Miami, after the CITY lost a State jury trial to evict LOZMAN's floating home from the CITY marina.

70. LOZMAN demanded the return of his floating home to the CITY marina and the CITY refused.

71. The CITY purchased LOZMAN's floating home at a U.S. Marshal auction. The CITY, after successfully preventing LOZMAN from stopping the confirmation of sale, maliciously destroyed LOZMAN's floating home at taxpayer expense.

72. The CITY permanently deprived LOZMAN of his property in a vindictive action to try and stop LOZMAN from exercising his First Amendment rights, to include continuing to fight the CITY's attempt to turn over the CITY marina over to a private developer.

73. The U.S. Supreme Court reversed the lower courts and ruled that LOZMAN's floating home was not subject to federal admiralty jurisdiction and should not have been seized.

74. LOZMAN is entitled to damages to include: i) the replacement value of his floating home, furniture and other accessories; ii) living expenses from April 2009 to November 2013; and iii) his legal fees at the district, appellate and U.S. Supreme Court.

~~75. The intentional, willful and wanton acts of PARDO, THOMAS, and DAVIS, to include malice and the willful disregard of LOZMAN's rights, establishes a claim for punitive damages against PARDO, THOMAS AND DAVIS.~~

DEMAND FOR TRIAL BY JURY

LOZMAN hereby demands a jury trial as to all issues triable by a jury.

WHEREFORE, LOZMAN respectfully requests that this Court enter judgment and award:

A. Reasonable and appropriate compensatory damages for: physical pain and discomfort, emotional distress and mental suffering that have been cured by the passage of time and have resulted in no permanent impairment.

~~B. Punitive damages against Defendants MICHAEL BROWN, GLORIA~~

~~SHUTTLESWORTH, NORMA DUNCOMBE, VANESSA LEE, ELIZABETH WADE, ANN ILES, GEORGE CARTER, DAWN PARDO, CEDRICK THOMAS, JUDY DAVIS and BRUCE GUYTON for their malicious, wanton, willful, reckless and knowing violations of LOZMAN's constitutional rights under the First Amendment.~~

C. A monetary sum representing the difference between the amount that the Admiralty District Court awards in Lozman's pending motion (Dkt. 212, attached as exhibit 1) in Case No. 09-80594-CIV-DIMITROULEAS/SNOW and the actual replacement cost of LOZMAN'S floating home to include its furniture and access ramp; LOZMAN'S living expenses between April 2009 to October 2013; and LOZMAN's attorneys' fees and costs that were incurred at the district court, appellate court, and the U.S. Supreme Court in Lozman v. The City of Riviera Beach, 568 U.S. ___(2013).

D. Damages for the conversion of LOZMAN's floating home and personal property.

~~E. Punitive damages against Defendants PARDO, THOMAS and DAVIS for the conversion of LOZMAN's floating home.~~

F. LOZMAN's costs, expenses and attorneys' fees pursuant to 42 U.S.C. __1988.

G. Awarding attorney fees, expenses and costs of this Section 1983 action pursuant to 42 U.S.C § 1988.; and

H. Such further and other relief as the Court deems necessary and proper.

Dated: November 18, 2013

By: /s/_____
Fane Lozman
Pro Se

Fane Lozman
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Riviera Beach, FL 33404
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(786) 251-5868

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No. 08-80134-CIV-HURLEY/MAGISTRATE HOPKINS

FANE LOZMAN,
Plaintiff,

v.

CITY OF RIVIERA BEACH, a Florida municipal corporation;
Defendant.

DEFENDANT CITY OF RIVIERA BEACH'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S SECOND AMENDED COMPLAINT [DE 325]

Comes Now, Defendant City of Riviera Beach ("Riviera"), a Florida municipal corporation, by and through its undersigned counsel, and pursuant to Rule 12, *Fed. R. Civ. P.*, and the Court's *order granting Plaintiff's oral motion to file the attached second amended complaint* [DE 325], hereby answers and affirmatively defends against Plaintiff Fane Lozman's ("Lozman") *second amended complaint* [DE 325], requests trial by jury, and states:

I. Answer

A. Nature of the Case

1. Riviera admits the nature of the allegations in the instant action only for jurisdictional purposes, and otherwise denies the allegations in paragraph 1.

B. Jurisdiction and Venue

2. Riviera admits the allegations in paragraph 2 only for jurisdictional purposes, and otherwise denies the allegations in paragraph 2.

3. Riviera admits the allegations in paragraph 3 only for venue purposes, and otherwise denies the allegations in paragraph 3.

C. Parties

4. Riviera admits Lozman was a resident of Riviera, but denies he was a resident at all times material to this litigation.

5. Admitted.

6. Admitted.

7. Paragraph 7 was struck from the *second amended complaint* [DE 325] and thus requires no answer by Riviera. Notwithstanding the foregoing, Riviera denies any of the allegations in Paragraph 7 to the extent the Court may deem that Riviera was required to answer such allegations.

8. Paragraph 8 was struck from the *second amended complaint* [DE 325] and thus requires no answer by Riviera. Notwithstanding the foregoing, Riviera denies any of the allegations in Paragraph 8 to the extent the Court may deem that Riviera was required to answer such allegations.

9. Paragraph 9 was struck from the *second amended complaint* [DE 325] and thus requires no answer by Riviera. Notwithstanding the foregoing, Riviera denies any of the allegations in Paragraph 9 to the extent the Court may deem that Riviera was required to answer such allegations.

10. Paragraph 10 was struck from the *second amended complaint* [DE 325] and thus requires no answer by Riviera. Notwithstanding the foregoing, Riviera denies any of the allegations in Paragraph 10 to the extent the Court may deem that Riviera was required to answer such allegations.

D. General Allegations

11. Riviera admits that Lozman moved to Riviera in 2006 and that Lozman docked a floating residence at Riviera's marina slip #452. Riviera lacks knowledge or information sufficient to form a belief as to the truth of the remaining the allegations in paragraph 11, and therefore denies those allegations.

12. Admitted.

13. Riviera lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13, and therefore denies those allegations.

14. Riviera admits its re-development plan involved exercising eminent domain to purchase and re-develop lands within Riviera, but denies the remaining allegations in paragraph 14.

15. Riviera admits Lozman made public comments at various Riviera city council meetings and Community Redevelopment Agency meetings between April 2006 to November 2013, but denies the remaining allegations in paragraph 15.

16. Denied.

17. Riviera lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17, and therefore denies those allegations.

18. Riviera admits that Governor Jeb Bush signed H.B. 1567 on May 11, 2006 and that H.B. 1567 speaks for itself, but otherwise denies the remaining allegations in paragraph 18.

19. Admitted.

20. Riviera admits that a scheduled closed executive session was held on June 28, 2006 during a part of which the City Council discussed its strategy for investigating and defending the claims asserted in Lozman's lawsuit, and admits that a transcript of that session exists, but denies the remaining allegations in paragraph 20.

21. Riviera admits that subsequent to June 2006 Lozman attended and spoke at Riviera's public meetings, but denies the remaining allegations in paragraph 21.

22. Paragraph 22 was struck from the *second amended complaint* [DE 325] and thus requires no answer by Riviera. Notwithstanding the foregoing, Riviera denies any of the allegations in Paragraph 22 to the extent the Court may deem that Riviera was required to answer such allegations.

23. Denied.

24. Riviera admits that Lozman was handcuffed and escorted away from the podium at Riviera's November 15, 2006 city council meeting and was charged for his conduct with the escorting officer, and admits portions of the incident were videotaped, but denies the remaining allegations in paragraph 24.

25. Riviera admits Lozman was escorted in handcuffs to the police department, and temporarily placed in a holding cell while his arrest paperwork was

processed, but denies the remaining allegations in paragraph 25.

26. Riviera admits that on November 15, 2006 Lozman was charged with disorderly conduct and resisting arrest without violence, and admits those charges were *nolle prossed* by an Assistant State Attorney, but denies the remaining allegations in paragraph 26.

27. Riviera admits that Lozman continued to attend Riviera's public meetings subsequent to November 15, 2006, but denies the remaining allegations in paragraph 27.

28. Denied.

(a) Denied.

(b) Denied.

(c) Denied.

(d) Denied.

(e) Riviera admits that Lozman was arrested on November 15, 2006 for disorderly conduct and resisting arrest without violence, but denies the remaining allegations in paragraph 28(e).

(f) Denied.

(g) Denied.

(h) Denied.

(i) Denied.

(j) Riviera admits that a federal admiralty action was brought against Lozman's floating residence which resulted in the seizure and destruction of the floating residence, and admits the U.S. Supreme

Court made new law regarding the definition of a "vessel" and in doing so reversed the admiralty jurisdiction determined by the U.S. Southern District of Florida and affirmed by the 11th Circuit, but denies the remaining allegations in paragraph 28(j).

(k) Denied.

(l) Denied.

(m) Denied.

(n) Denied.

(o) Denied.

E. Count I – 42 USC § 1983 Against Defendant City of Riviera Beach

29. Riviera admits the nature of the Lozman's alleged cause of action, but denies the remaining allegations in paragraph 29.

30. Riviera re-alleges and re-avers its answers contained in paragraphs 1 through 28 as if fully set forth herein.

31. Riviera admits the existence of the rights generally alleged in paragraph 31, but denies Lozman held a right to exhibit improper conduct at public meetings and further denies Riviera has violated any of Lozman's alleged rights.

32. Riviera admits the existence of the rights generally alleged in paragraph 32, but denies Lozman held a right to exhibit improper conduct at public meetings and further denies Riviera has violated any of Lozman's alleged rights.

33. Denied.

34. Denied.

35. Denied to the extent such allegations purport to refer to any alleged improper actions against Lozman.

36. Denied.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied to the extent such allegations purport to refer to any alleged improper actions against Lozman.

46. Paragraph 46 was struck from the *second amended complaint* [DE 325] and thus requires no answer by Riviera. Notwithstanding the foregoing, Riviera denies any of the allegations in Paragraph 46 to the extent the Court may deem that Riviera was required to answer such allegations.

47. Paragraph 47 was struck from the *second amended complaint* [DE 325] and thus requires no answer by Riviera. Notwithstanding the foregoing, Riviera denies any of the allegations in Paragraph 47 to the extent the Court may deem that Riviera was required to answer such allegations.

48. Denied.

(a) Denied.

(b) Riviera admits that Lozman's has not suffered any permanent impairment allegedly caused by any act of the Defendants, but denies the remaining allegations in paragraph 48(b).

(c) Denied.

(d) Denied.

(e) Denied.

(f) Denied.

(g) Paragraph 48(g) was struck from the *second amended complaint* [DE 325] and thus requires no answer by Riviera. Notwithstanding the foregoing, Riviera denies any of the allegations in Paragraph 48(g) to the extent the Court may deem that Riviera was required to answer such allegations.

49. Denied.

50. Denied.

F. Count II – Conspiracy To Violate Civil Rights (Against Defendants Brown, Shuttlesworth, Duncombe, Lee, Wade, Iles, Pardo, Thomas, Davis, and Guyton)

51-53. Count II was struck from the *second amended complaint* [DE 325] and thus requires no answer. Further, Count II was not directed toward Riviera, and therefore Riviera was not required to respond to the allegations in Count II. Notwithstanding the foregoing, Riviera denies any of the allegations in Count II to the extent the Court may deem such allegations to apply to Riviera.

G. Count III – False Arrest (State Tort of False Arrest against Defendant City)

54. Riviera admits the nature of the Lozman's alleged cause of action, but denies the remaining allegations in paragraph 54.

55. Riviera re-alleges and re-avers its answers contained in paragraphs 1 through 28 as if fully set forth herein.

56. Denied.

57. Riviera admits that Lozman was handcuffed and escorted away from the podium at Riviera's November 15, 2006 city council meeting and charged for his conduct with the escorting officer, but denies the remaining allegations in paragraph 57.

58. Denied.

59. Denied.

60. Riviera admits that on November 15, 2006 Lozman was charged with disorderly conduct and resisting arrest without violence, but denies the remaining allegations in paragraph 60.

61. Riviera admits that the Assistant State Attorney *nolle prossed* the November 15, 2006 charges against Lozman, but denies the remaining allegations in paragraph 61.

62. Denied.

63. Riviera admits that local news channel WPBF 25 reported the Assistant State Attorney *nolle prossing* the November 15, 2006 charges against Lozman, but Riviera otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 63, and therefore denies those allegations.

64. Denied.

(a) Riviera admits that Lozman's November 15, 2006 arrest did not cause any permanent impairment, but denies the remaining allegations in paragraph 64(a).

65. Denied.

66. Denied.

G. Count IV – State Tort of Battery Against Defendant City of Riviera Beach

67(63). Riviera re-alleges and re-avers its answers contained in paragraphs 1 through 28 as if fully set forth herein.

68(64). Denied.

69(65). Riviera admits that it is responsible for the acts of its law enforcement officers when acting in good faith and within the course and scope of their employment, but denies the allegations in paragraph 69(65) to the extent such allegations purport to refer to any alleged improper actions against Lozman.

70(66). Riviera admits that its law enforcement officers touched Lozman on November 15, 2006 and October 21, 2009, but denies the remaining allegations of paragraph 70(66).

71(67). Riviera admits that Lozman's has not suffered any permanent impairment allegedly caused by any act of the Defendants, but denies the remaining allegations in paragraph 71(67).

72(68). Denied.

H. Count V – State "Intentional Tort" of Conversion Against The City

73(69). Riviera admits that Lozman's floating home and its contents were seized and towed to Miami

by U.S. Marshals upon a finding of probable cause by U.S. District Judge Dimitrouleas, but denies the remaining allegations in paragraph 73(69).

74(70). Admitted.

75(71). Riviera admits that it purchased Lozman's floating home at the U.S. Marshal auction and that the floating home was subsequently disposed of, but denies the remaining allegations in paragraph 75(71).

76(72). Denied.

77(73). Riviera admits that the U.S. Supreme Court made new law regarding the definition of a "vessel" and in doing so reversed the admiralty jurisdiction determined by the U.S. Southern District of Florida and affirmed by the 11th Circuit, but denies the remaining allegations in paragraph 77(73).

78(74). Denied.

79(75). Paragraph 79(75) was struck from the *second amended complaint* [DE 325] and thus requires no answer by Riviera. Notwithstanding the foregoing, Riviera denies any of the allegations in Paragraph 79(75) to the extent the Court may deem that Riviera was required to answer such allegations.

II. Affirmative Defenses

80. Each and every allegation not herein specifically admitted is denied and strict proof is demanded thereof.

81. Pursuant to Chapter 163, *Fla. Stat.*, the Community Redevelopment Agency ("CRA") serving Riviera constitutes a legal entity, separate, distinct, and independent from the governing body of Riviera. As such, Lozman may not recover from Riviera any damages stemming from Lozman's alleged causes of

action which are premised on facts attributed to the CRA. Rather, such causes of action attributed to the CRA fail to state a claim upon which relief can be granted against Riviera.

82. Although the Supreme Court in *Lozman v. City of Riviera Beach*, 133 S.Ct. 735 (2013) reversed on admiralty jurisdiction and rendered the admiralty aspects of *City of Riviera Beach v. Unnamed Gray*, 649 F.3d 1259, (11th Cir. 2011) – S.D. Fla. Docket No. 9:09-cv-80594-WPD – non-binding on these proceedings, the evidence presented in that case and the Court's resulting findings of fact and conclusions of law pertaining to the retaliation issues remaining binding – or alternatively persuasive authority - for these proceedings. Specifically, in that trial Lozman fully litigated his history with Riviera which is the subject of this case, in the context of an asserted affirmative defense premised on retaliation. Ultimately, the Courts within that case determined that Riviera had not acted with retaliatory motives against Lozman. Those rulings were premised on separate subject matter jurisdiction invoked by Lozman's defenses and remain binding on these proceedings. Alternatively, to the extent this Court determines those proceedings are non-binding, this Court – during its own review of the same facts and law – should consider the admiralty proceedings as persuasive authority for holding that Riviera did not retaliate against Lozman in violation of his rights.

83. As Lozman fully, unsuccessfully litigated his asserted affirmative defense premised on retaliation within the admiralty proceedings, Lozman is on notice that re-litigating those same facts and legal arguments in this case is frivolous litigation. As such,

in prevailing in this action, Riviera will be entitled to recovery of its attorneys' fees and non-taxable costs pursuant to 42 U.S.C.S. § 1988(b) and 42 U.S.C. § 2000e-5(k).

84. To the extent that Count I alleges violations beyond First Amendment retaliation, those allegations should be dismissed as repetitive as all causes of action in Count I are premised upon alleged retaliation for Lozman's expressive activity. *See Watkins v. Bowden*, 105 F.3d 1344, 1354 (11th Cir. 1997).

85. Lozman fails to state a retaliation claim upon which relief can be granted, as Lozman fails to establish that: (a) his speech or actions were constitutionally protected; (b) Riviera's alleged retaliatory conduct adversely affected the protected conduct; and (c) there is a causal connection between the alleged retaliatory actions and the adverse effect on his speech. *See Bennett v. Hendrix*, 423 F.3d 1247 (11th Cir. 2005).

86. Lozman fails to state a claim upon relief can be granted for any alleged conduct pertaining to restricting Lozman's speech during Riviera city council meetings, as such meetings are limited public forums and are not open for endless public commentary speech but instead are simply a limited platform to discuss the topic at hand. *See Thomas v. Howze*, 348 Fed.Appx. 474 (11th Cir. 2009); *Cleveland v. City of Cocoa Beach, 221 Fed. Appx. 875* (11th Cir. 2007); *and Rowe v. City of Cocoa*, 358 F.3d 800 (11th Cir. 2004).

87. Lozman fails to state a retaliation claim upon which relief can be granted, to the extent his claims

are premised upon Riviera enacting prospective, generally applicable ordinances/ regulations/ rules/ policies/ etc. . .

88. Lozman fails to state a claim for municipal liability against Riviera upon which relief can be granted, as he fails to establish an official "policy" or "custom" that was the "moving force" behind the alleged conduct attributed to Riviera. *See City of St. Louis v. Praprotnik,* 485 U.S. 112 (1988); *Monell v. Dept. of Social Serv. of the City of New York*, 436 U.S. 658 (1978).

89. Lozman fails to state a claim for municipal liability against Riviera upon which relief can be granted, as the facts belie the existence of a "policy" or "custom" of retaliation against Lozman. Specifically, during the times material to this action, Lozman interacted with Riviera, its agents, and employees, on numerous occasions without incident. Conversely, any alleged negative interactions between Lozman and Riviera were the result of Lozman's improper conduct justifying legitimate action.

90. Lozman fails to state a claim for municipal liability against Riviera upon which relief can be granted, as he fails to establish the alleged unconstitutional motive and/or alleged conduct was attributable to Riviera's "final policymaking authority." Specifically, Riviera's governing body is a city council consisting of five (5) residents. Lozman fails to establish municipal liability against Riviera, as none of the individual members of the city council constitute Riviera's "final policymaking authority," and none of the alleged conduct allegedly motivated by animus can be attributed to a majority of Riviera's city council. *See Board of County Com'rs of Bryan County,*

Okl. v. Brown, 520 U.S. 397 (1997); *Campbell v. Rainbow City, Alabama*, 434 F.3d 1306 (11th Cir. 2006); *and Matthews v. Columbia County*, 294 F.3d 1294, 1297-98 (11th Cir. 2002).

91. Lozman fails to state an equal protection claim upon which relief can be granted, as he fails to establish with specificity that any of the alleged conduct resulted in Lozman being treated differently from other similarly situated individuals which were prima facie identical to Lozman in all relevant respects. *See Campbell v. Rainbow City, Alabama*, 434 F.3d 1306 (11th Cir. 2006); *E & T Realty v. Strickland*, 830 F.2d 1107 (11th Cir. 1987). Rather, evidence of Lozman's equal treatment includes, but it not limited to, others violating decorum being removed from meetings, and sixteen (16) other vessels/floating homes being required to vacate Riviera's marina at the same time Lozman was required to remove his floating home.

92. Lozman fails to state a Fourteenth Amendment procedural due process claim upon which relief can be granted, as he fails to establish that the Florida State court refused to provide an adequate remedy for his alleged procedural deprivations. *See East v. Clayton County, 436 Fed. Appx. 904* (11th Cir. 2011); *Horton v. Board of County Commissioners of Flagler County*, 202 F.3d 1297 (11th Cir. 2000); *and McKinney v. Pate, 20* F.3d 1550 (11th Cir. 1994). To the contrary, Lozman previously litigated the majority of this action in the Florida State Court - *See City of Riviera Beach v. Fane Lozman*, 15th Judicial County Case No.: 502006CC011382XXXXMB (transferred to Circuit Case No.: 502006CA014054XXXXMB) – prior

to voluntarily dismissing the State action in August 2010.

93. Lozman fails to state a Fourteenth Amendment (substantive due process / procedural due process / equal protection) claim upon which relief can be granted, as: (a) any alleged restrictions of Lozman's fundamental rights were the result of restrictions narrowly tailored to further a compelling government interest (i.e. pass strict scrutiny review); and (b) any alleged restrictions of Lozman's non-fundamental rights were reasonably related to a legitimate government interest (i.e., pass rational basis review).

94. Lozman fails to state a Fourteenth Amendment procedural and/or substantive due process claim upon which relief can be granted regarding the seizure of his floating home, as Riviera's actions were in compliance with the then existing admiralty law, which actions were approved and conducted by the U.S. District Court sitting in admiralty and affirmed by the 11th Circuit Court of Appeals, and which was later reversed only because the U.S. Supreme Court modified the definition of "vessel" for purposes of admiralty jurisdiction.

95. Lozman fails to state false arrest and/or Fourth Amendment unreasonable seizure (either of his person or his property) claims upon which relief can be granted, as probable cause existed for any and all seizures and/or arrests. *See Gomez v. Lozano,* 839 F. Supp.2d 1309 (S.D. Fla. 2012). Regarding the seizure of Lozman's floating home and its contents, U.S. District Judge Dimitrouleas specifically found there was probable cause to arrest Lozman's floating home prior to ordering the arrest.

96. Lozman fails to state a claim upon which relief can be granted for the state tort of conversion regarding his floating home and its contents, as at all material times Lozman did not possess an immediate right to access and/or possess the property due to his debts owed for his use of Riviera's public marina.

97. Lozman fails to state a claim upon which relief can be granted for the state tort of battery, as any touching of Lozman's person was necessary and incident to lawful law enforcement action which was reasonable and justified by the circumstances (including but not limited to the existence of probable cause for any alleged seizures).

98. Lozman lacks standing to assert any alleged claims of others, which are referenced in his paragraph 28(o), and the Court must strike such allegations from the complaint.

99. Lozman is currently litigating the issue of his alleged damages associated with the seizure of his floating home and its contents within the related (former admiralty) action of *City of Riviera Beach v. Unnamed Gray*, S.D. Fla. Docket No. 9:09-cv-80594-WPD. Once Judge Dimitrouleas renders a final order on such damages, the federal doctrine of *collateral estoppel* will attach to that order and prohibit Lozman from continuing to litigate such damages in this action.

100. Even if damages are awardable to Lozman in this action for his floating home and its contents, Lozman is not entitled to an award of the "replacement cost" and/or the difference between the amount awarded by Judge Dimitrouleas – if any – and the replacement cost. Rather, the proper measure of any

such damages is the fair market value of the property at the time of the seizure.

101. Even if damages are awardable to Lozman in this action for his floating home and its contents, Lozman is not entitled to an award of loss of use damages. *See MCI WorldCom Network Servs. v. Mastec, Inc.*, 995 So.2d 221 (Fla. 2008) ("Moreover, loss-of-use damages can be an element of compensatory damages when the damage is to personal property and the damage amounts to less than total destruction of the property."); *and Foresight Enters. v. Leisure Time Properties*, 466 So.2d 283 (Fla. 5th DCA 1985) (Cowart, J., dissenting: "When. . . property is converted. . . and not recovered by the owner, just as when it is totally destroyed by negligence, the owner is entitled to money damages in an amount equal to the fair market value of the property at the time of its conversion or negligent destruction. See, e.g., § 78.19(1), *Fla. Stat.* The owner is not entitled to additional money damages for loss of profits or loss of use or damages for depreciation to the property itself.").

102. Riviera was solely motivated by legitimate reasons for its actions. However, in the alternative, should the trier of fact ultimately find that retaliation against Lozman was a motivating factor in any conduct, Riviera would have made the same decision(s) with respect to Lozman without regard to any consideration of improper motive (i.e. "same decision" or "mixed motive" defense).

103. Riviera was solely motivated by legitimate reasons for its actions. However, in the alternative, should the trier of fact ultimately find that retaliation against Lozman was a motivating factor in any

conduct directed by Riviera's city council at any specific point in time, any casual connection between such animus and the alleged subsequent conduct, was broken by the subsequent election of other individuals to Riviera's city council whom independently (without animus) directed the alleged subsequent conduct.

104. Lozman's awarded damages relating to his reputation (and any derivation thereof; i.e. emotional distress, mental anguish, etc. . .) – if any – are barred, in whole or in part, to the extent Lozman caused and/or exacerbated such damages by self-publishing information regarding Riviera's alleged negative actions against Lozman. Throughout the course of Lozman's history with Riviera, Lozman has continuously self-published such information to third-parties via various internet websites, social media, print media, and even in television interviews. As such, Lozman has caused and/or exacerbated the alleged damages to his reputation for which he now seeks to recover against Riviera.

105. Lozman has caused, exacerbated, and/or failed to mitigate his damages, and any awarded damages must be appropriately reduced. Such conduct includes, without limitation, Lozman: intentionally escalated his interactions with Rivera; self-published the alleged negative interactions; and failed to meaningfully bid on his floating home at the public auction to foreclose on Riviera's lien. Specifically regarding Lozman's failure to meaningfully bid on his floating home (and its contents), Riviera asserts that Lozman's damages related to that property – if any – must be reduced to the actual purchase price of the property achieved at the auction.

106. Should he prevail, Lozman is not entitled for reimbursement of any fees and costs which (a) he did not incur or (b) which were not incurred in prosecuting this action. Additionally, Lozman is not entitled to reimbursement of any "attorneys' fees" for any periods during which Lozman acted as a *pro se* litigant.

107. Lozman's claims are barred, in whole or in part, by Florida's doctrine of *res judicata*. Lozman previously litigated the majority of this action in the Florida State Court – *See City of Riviera Beach v. Fane Lozman*, 15th Judicial County Case No.: 502006CC011382XXXXMB (transferred to Circuit Case No.: 502006CA014054XXXXMB) – which he voluntarily dismissed with prejudice in August 2010. Pursuant to Florida law, Lozman's voluntary dismissal with prejudice was an adjudication on the merits which prevents Lozman from re-litigating all of the issues and/or causes of action which were raised, or which could have been raised, in that action; including without limitation, all claims Lozman raised in his counterclaim, amended counterclaim, second amended counterclaim, third amended counterclaim, and fourth amended counterclaim.

108. Lozman's claims are barred, in whole or in part, by Florida's doctrine of *collateral estoppel*. Lozman previously litigated the majority of this action in the Florida State Court – *See City of Riviera Beach v. Fane Lozman*, 15th Judicial County Case No.: 502006CC011382XXXXMB (transferred to Circuit Case No.: 502006CA014054XXXXMB) – which he voluntarily dismissed with prejudice in August 2010. Pursuant to Florida law, Lozman's voluntary dismissal with prejudice was an adjudication on the

merits which prevents Lozman from re-litigating all of the issues and/or causes of action which were raised, or which could have been raised, in that action; including without limitation, all claims Lozman raised in his counterclaim, amended counterclaim, second amended counterclaim, third amended counterclaim, and fourth amended counterclaim.

109. Pursuant to Rule 12(b)(6), *Fed. R. Civ. P.*, Lozman's ***second amended complaint*** fails to state claims for which relief can be granted for any conduct allegedly occurring at City Council and/or CRA meetings but for which Lozman fails to specific: (a) the date; (b) whether it was a City Council or a CRA meeting; (c) the alleged adverse conduct; and (d) the individual elected officials and/or employees which allegedly participated in the conduct on behalf of the City Council or the CRA.

110. Pursuant to Rule 12(b)(6), *Fed. R. Civ. P.*, Lozman's ***second amended complaint*** fails to state claims for which relief can be granted for any conduct allegedly occurring outside of City Council and/or CRA meetings but for which Lozman fails to specific: (a) the date; (b) the alleged adverse conduct; and (c) the individual elected officials and/or employees which allegedly participated in the conduct on behalf of the City Council or the CRA. Claims against the government arising from alleged violations of constitutional rights must allege, with particularity, facts that demonstrate what the government did to violate the asserted constitutional right. Rule 8, *Fed. R. Civ. P.*, demands more than an unadorned, the-defendant-harmed-me accusation.

111. Lozman's Count III (State tort of false arrest), Count IV (State tort of battery), and Count V

(State intentional tort of conversion) fail to state causes of action for which relief can be granted due to Riviera's sovereign immunity against such claims and Lozman's failure to comply with the mandatory pre-suit notice requirements of § 768.28(6), *Fla. Stat.* Lozman was required, yet failed, to comply with the statutory notice requirements prior to instituting any causes of action founded on State torts against Riviera. Riviera remains sovereignly immune against any such causes of action for which Lozman failed to timely comply with § 768.28(6), *Fla. Stat.* Additionally, the *second amended complaint* is deficient as to these claims as it fails to allege compliance with §768.28(6), *Fla. Stat.* As such, the Court must dismiss with prejudice the entirety of Lozman's causes of action founded on State torts against Riviera. *See Wagatha v. City of Satellite Beach,* 865 So.2d 620 (Fla. 5th DCA 2004); *Woodbury v. State of Fla. DCF,* 854 F.Supp.2d 1184 (S. D. Fla. 2011); *and Fletcher v. City of Miami,* 567 F.Supp.2d 1389 (S. D. Fla. 2008).

112. Lozman's claims are barred by the applicable statute of limitations.

113. Riviera hereby gives notice that it intends to amend its affirmative defenses, or rely upon other such affirmative defenses, as may become available or apparent during the course of discovery and, thus, reserves the right to amend this answer and assert any such defense.

III. Demand For Jury Trial

Defendant City of Riviera Beach demands trial by jury on all issues so triable.

Wherefore, Defendant City of Riviera Beach, respectfully requests this Court to enter an order

dismissing Plaintiff Fane Lozman's *second amended complaint* [DE 325] with prejudice, and awarding Riviera its attorneys' fees (pursuant to 42 USC § 1988(b)) and costs, and such other relief as this Court deems proper, and further requests trial by jury.

Respectfully submitted,

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* * *

[1] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach
CASE NO. 9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff November 26, 2014

vs.

CITY OF RIVIERA BEACH,

Defendant.

TRIAL DAY 3

BEFORE THE HONORABLE
DANIEL T.K. HURLEY,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

FOR THE PLAINTIFF:	FANE LOZMAN, pro se 2913 Avenue F Riviera Beach FL 33404 (786) 251-5868 sp500trd@yahoo.com
FOR THE DEFENDANT:	BENJAMIN L. BEDARD, Esq. STEPHANIE KAUFER, Esq. Roberts Reynolds Bedard & Tuzzio 470 Columbia Drive, Bldg C-101 West Palm Beach FL 33409 (561) 688-6560 bbedard@rrbpa.com

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* * *

[TESTIMONY OF LORETTA WADE]

[DIRECT EXAMINATION]

[BY MR. LOZMAN]:

[8:12]

* * *

Q. Is there a portion of the agenda that's designated for public comment?

A. Yes.

Q. And what does that public comment entail?

A. The public comment entails that we listen to the public. And generally, it can be on any item that's concerning the city. We usually ask that the people are not redundant and we have even set up a code of ethics for the citizens and for the council.

* * *

[16:1]

A. The two-minute public comment was for things that was germane to the city of Riviera Beach. Any time you were not talking about city business, or

something that was helpful to the city, we did not want you to waste the city's time and the residential taxpayer's time.

The reason I said that, and stopped him before the two minutes, he had a habit of coming up and saying derogatory things and telling us that FDLE was in our backyard, and that we were being investigated and calling us crooks.

And so I simply stopped him. He was talking about Tommy Masilotti, which had nothing at all to do with the City of Riviera Beach. There were no deliberations which we had to do with that. There was no proof of anything that had ever happened in the City of Riviera Beach. So I stopped him. And he had a habit of doing that. If you played the minutes of every meeting that he attended, his actions were the same. He also --

THE COURT: All right. Let me just stop you for a second. It's very important that you listen to the question, and try to respond only to the question. So let's go back to Mr. Lozman for his next question.

BY MR. LOZMAN:

Q. Isn't public corruption an important topic to discuss at a city meeting?

[17]

A. If it concerns our city, yes.

* * *

[101:3]

[BY MR. LOZMAN]:

Q. How do you feel about public comment as an elected official for the City of Riviera Beach?

A. As an elected official, I wish it wasn't there. As a citizen, it needs to be there. Because every time – the average citizen don't always have an issue with everything that the council is doing at that point, but they may have something that needs to be brought to the council, and that's a way of doing it, and getting it out in the public. So I think it's a necessary tool – I don't know whether we had to do it or not, but I think it's a necessary tool that the elected officials hear from the people you serve.

* * *

[174:1]

[TESTIMONY OF DET. FRANCISCO AGUIRRE]

[DIRECT EXAMINATION]

[BY MR. LOZMAN]:

Q. Do you take orders from civilians?

A. No.

Q. So why did you take an order from Ms. Wade? That's her voice. Why did you take an order from her to drag me out?

MR. BEDARD: Objection. Not —

A. I didn't —

THE COURT: Wait a minute. What is the legal basis of the objection?

MR. BEDARD: He's failed to establish an order was given.

THE COURT: Overruled.

BY MR. LOZMAN:

Q. You can answer the question.

A. I was not given an order, or I was not obeying an order from a civilian.

Q. So it's just a coincidence that you dragged me out after she said that?

A. No. You were escorted out based on your behavior.

Q. But if Ms. Wade had not directed your attention to come forward, you never would have come forward?

A. Actually, I would have came forward based on your behavior and your voice raising gradually.

Q. My voice is not raised on this video.

MR. BEDARD: Argumentative – objection. Argumentative.

[175]

THE COURT: Sustained.

BY MR. LOZMAN:

Q. So you're saying as you sit there now that if Ms. Wade had said nothing, you would have come up to the podium to remove me?

A. Yes.

* * *

[207:7]

[TESTIMONY OF DET. FRANCISCO AGUIRRE]

[CROSS-EXAMINATION]

[BY MR. BEDARD]:

Q. Okay. And when did you become a police officer at the City of Riviera Beach Police Department?

A. **On June of 2006.**

Q. So at the time of this meeting, which would have been November of 2006, you had been a police officer there for a short period of time?

A. **Yes.**

Q. Prior to the date of this incident, November 15th, 2006, had you ever served in the capacity at a meeting like this?

A. **No.**

Q. All right. And what do you refer to this meeting – or what does the City police department refer to these type of meetings as, as far as a duty?

A. **It's a security detail.**

Q. Okay. And is that part of your normal working hours for the police department or is this a special security detail that you volunteer for?

A. **It's a special security detail.**

Q. All right. And so would you have requested to work extra [208] duty, I guess, so to speak?

A. **Yes.**

Q. All right. And what was your understanding of your assignment on November 15th, 2006?

A. **I was assigned to keep – to provide security at the City Council meeting.**

Q. And is it your understanding that, historically, the police department provided security for these meetings?

A. **Yes.**

* * *

[208:10]

Q. And had you ever heard Fane Lozman's name before November 15th, 2006?

A. No.

Q. Had you been made aware of Mr. Lozman in any way, shape, or form before November 15th, 2006?

A. No.

Q. Had you ever seen him on TV? Had you ever met him in person? Anything of that nature?

A. No.

Q. And – but were you aware the meetings were videotaped on November 15th, 2006?

A. No.

Q. Okay. Had you ever met Mr. Lozman – I'm sorry. I asked that question.

Prior to the meeting on November 15th, 2006, did any Council people speak to you about Mr. Lozman?

[209]

A. No.

Q. Did you speak to any of the Council people about anything before the meeting on November 15th, 2006?

A. No.

Q. All right. Did you speak to your police chief about Mr. Lozman before the meeting of November 15th, 2006?

A. No.

Q. Have you ever discussed Mr. Lozman with your chief or any other officers before November 15th, 2006?

A. No.

* * *

[219:9]

Q. Okay. Now, do you take your direction from the City Council members?

A. No.

Q. All right. Did – whether you decide to arrest Mr. Lozman or not, was that going to be based on a direction by Ms. Wade?

A. No.

* * *

[1] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach
CASE NO. 9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff November 18, 2014

vs.

CITY OF RIVIERA BEACH,

Defendant.

TRIAL DAY 4

BEFORE THE HONORABLE
DANIEL T.K. HURLEY,
UNITED STATES DISTRICT COURT JUDGE

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* * *

[50:2]

[TESTIMONY OF ANN ILES]

[CROSS-EXAMINATION]

[BY MR. BEDARD]:

Q. Sure. What was the order of the meetings? How did they generally work? You come in, you call it to order, I would imagine.

A. Yes, call it to order. Then we would look at whether there was going to be any additions or deletions to the agenda and then we would discuss the consent agenda. If there was any Council member that

wanted to pull the item from the consent agenda, that was done.

In the past we would even allow residents to pull consent agendas in. That continued to create problems. So when I became chair, we tried to just limit that to Council members. There was nothing that said a resident couldn't get with their representative to have that item pulled. Okay.

So once we cleared up the consent agenda, then we went into the other items, residents were given the opportunity to speak on those items.

Q. Let me stop you there and ask you a question. Would those often be referred to as agenda items?

A. Yes.

Q. And were the public comments limited when it was on a specified agenda item, was there any restrictions on the public comments?

A. Yes, we started off with – well, the practice had been a two-minute speaking time and because a number of people were [51] concerned about they did not have enough time to finish their comments, we moved it up to three minutes. So that was the time span allotted.

Q. What about in regards to, say, if the topic is on the solid waste authority contract? Can they get up and talk about the marina say, for example?

A. No.

Q. On an agenda item?

A. Yes.

Q. It has to be limited to the item that you're discussing in the agenda?

A. Right.

Q. Was there also a public comment time period?

A. Yes.

Q. What was the purpose of the public comment?

A. For them to address any issue they wanted to put before the Council that was not on that night's agenda.

Q. And were those comments to be talking about, say, the State of Oklahoma's affairs?

A. No.

Q. What was the purpose behind the public comment?

A. It's a range from there's a hole in my street, there's grass growing up in the canal behind my house, I'm unhappy about this or I want to see this happen.

So it was a plethora of topics brcught before – my [52] Little League baseball team won some championship. So it was a plethora of things brought before the Council during that time.

Q. Now, you were shown the videotape of 11-15-2006?

A. Yes.

Q. And that was the one when you had stepped away to go to the restroom when the incident occurred with Mr. Lozman, right?

A. Yes.

Q. He mentioned Mr. Masilotti, you identified who he is. You also mentioned Mr. Liberti. Do you know where Mr. Liberti was an elected official at that time?

A. I believe in West Palm Beach.

Q. Does the City of West Palm Beach have anything to do with what's going on at the City of Riviera Beach?

A. No.

* * *

[1] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach
CASE NO. 9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff November 20, 2014

vs.

CITY OF RIVIERA BEACH,

Defendant.

TRIAL DAY 5

BEFORE THE HONORABLE
DANIEL T.K. HURLEY,
UNITED STATES DISTRICT COURT JUDGE

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* * *

[11:13]

[TESTIMONY OF DANNY D. JONES]

[CROSS-EXAMINATION]

[BY MR. BEDARD]:

Q. All right. And whose discretion it is – is it to arrest somebody or not?

A. Ultimately, it's up to the officer. The officer has to establish probable cause and determine if he wants to make the arrest.

Q. Can the chairperson tell you to arrest somebody?

A. No, sir.

Q. Can even the city manager tell you to arrest somebody?

A. No, sir. That's left up to the – in this case, left up to the discretion of the police officer.

* * *

[1] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach
CASE NO. 9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff November 26, 2014

vs.

CITY OF RIVIERA BEACH,

Defendant.

TRIAL DAY 8

BEFORE THE HONORABLE
DANIEL T.K. HURLEY,
UNITED STATES DISTRICT COURT JUDGE

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[41:22]

[THE COURT]: Let's move on now to the jury instructions. I think if you look at the jury instructions, everything is standard up to page 5, the claims in this case. Does everybody have a copy of the jury instructions in Word [42] format?

MS. KAUFER: Yes, Your Honor.

THE COURT: Do you have that, Mr. Lozman?

MR. LOZMAN: I have your copy, yes, sir.

THE COURT: Okay. My suggestion is let's deal first with the proposed jury instruction on First Amendment retaliation.

MS. KAUFER: Your Honor, the city has prepared a —

THE COURT: Hold on, please.

First and foremost, does the plaintiff object to the elements of this claim that are found on page 5 and the top of page 6? The four elements?

MR. LOZMAN: I only had three elements.

THE COURT: Do you have the jury instruction page 5 and going on to page 6?

MR. LOZMAN: Right. I'm saying in my analysis I only had three elements.

THE COURT: The jury instruction sets for four elements on page 5 and 6. Do you have the right jury instructions?

MR. LOZMAN: Yes, sir, I do.

THE COURT: Okay. Do you have four elements there?

MR. LOZMAN: Yes, I do.

THE COURT: Okay. Do you object – are you satisfied with those elements?

[43]

MR. LOZMAN: I need to look at my board. Can I just retrieve my board?

THE COURT: Yes, you can look at anything you like.

MR. LOZMAN: Okay. Give me one minute, Your Honor.

My —

THE COURT: Can you come on up to the lectern, please?

MR. LOZMAN: Sure.

THE COURT: Let me begin. Are you satisfied with the first introductory paragraph on page 5 under the heading First Amendment Retaliation?

MR. LOZMAN: I'm satisfied with everything but the final paragraph. I don't believe the fourth element has to be proved. I don't think the fourth element is relevant.

THE COURT: All right. Thank you. Are you satisfied with everything else, though, in the jury instruction? And I'm going then to the bottom of page 6.

MR. LOZMAN: Everything but the last paragraph.

* * *

[77:23]

MS. KAUFER: Your Honor, the city next goes on to add an instruction that Mr. Lozman's arrest on November 15th, 2006, cannot constitute adverse conduct for purposes of [78] retaliation unless you found previously on Mr. Lozman's Fourth Amendment claim that Officer Aguirre did not have probable cause to arrest Mr. Lozman.

What the city did in our proposed instructions was we put the Fourth Amendment claim first. That way the jury has already made the determination as to whether or not there was probable cause for Mr. Lozman's arrest on November 15th, 2006. The way the Court had it, the Court had a separate instruction given as false arrest as retaliation under the First Amendment where the probable cause element was

stated and then kind of referred – incorporated in there.

THE COURT: I hear you on that. Can you hold off on that, though? I understand what you're saying. Conceptually it would make sense if the jury had addressed that issue. So okay. I understand. Let's wait on that one.

* * *

[81:1]

THE COURT: All right. Let's move on to false arrest. And I'd like to go back to the city for a minute.

What is the city's theory on the justification to arrest Mr. Lozman?

MS. KAUFER: Your Honor, the city's theory is that Officer Aguirre had probable cause to arrest Mr. Lozman for any one of four different offenses, and we lay those offenses out.

THE COURT: What are the four offenses?

MS. KAUFER: Disorderly conduct.

THE COURT: What was the disorderly conduct? How does Florida – how does Florida define disorderly conduct?

MS. KAUFER: Florida defines disorderly conduct as committing such acts as of a nature to corrupt the public morals or outrage the sense of public decency or breach of the peace and quiet of the persons who may witness them or to engage in brawling or fighting or engages in such conduct as to constitute a breach of the peace or disorderly conduct.

THE COURT: Okay. Now, how have the Florida courts interpreted that statute? What do they require

before someone can be found guilty of disorderly conduct?

MS. KAUFER: They require words known to be false, utterance of words known to be false, like shouting fire in a crowded theater.

THE COURT: Yeah.

[82] **MS. KAUFER:** Or fighting words.

THE COURT: Okay. Aren't you willing to concede that that doesn't happen here?

MS. KAUFER: I do believe that there is a question, Your Honor, because when Mr. Lozman – when Officer Aguirre comes up to Mr. Lozman and asks him to leave, Mr. Lozman turns to him and at that point says, I'm not going anywhere. And things at that point start to get heated. And I think that there is a colorable issue as to whether or not that would be considered incitement, if you will, under disorderly conduct.

THE COURT: All right. I don't think you'd get too far there. You have a problem with that one. And, you know, it's interesting because if we say that a city commission can have Rules of Decorum – and I think we all agree they can. We can debate what are the Rules of Decorum. Obviously, they can enforce those rules by having – if necessary, having a sergeant-at-arms or a police officer come up and literally move somebody away.

The problem, I guess, gets into the situation where the person at the podium refuses to move. And there have been several instances of that in this case. Mr. Lozman, for instance, exclaiming, I have 46 seconds left, or something like that. It doesn't sound to me like that's disorderly conduct. Certainly causing a

disturbance at the meeting, but [83] it doesn't sound like that's disorderly conduct. If it's not – at least disorderly conduct as the Florida courts have defined that statute. When you read that statute, there are lots of – lot of terms like breach of the peace, and that's – it sounds very encompassing. But we realize the statute has been interpreted so much in a narrow fashion. So if it's not disorderly conduct, what would be something else that it could be?

MS. KAUFER: Well, Your Honor, there's three other offenses.

THE COURT: And just to come back for a minute. I think we all agree that when a policeman literally takes somebody by the shoulder and moves him out of the chamber, if that's the thing, that's not an arrest. It may escorting the person from the podium, but that's not an arrest. Because our problem here is, as we all saw, early on the officer, Officer Aguirre, he takes out the handcuffs and he puts it on. And I think everybody would acknowledge that is an arrest at that point. And even he acknowledged it. He was asked point blank, Did you place Mr. Lozman under arrest? And he said yes.

But I think as a matter of law, clearly that was an arrest. And a reasonable person would have assumed at that point that his ability to, you know, leave or be out of the control of the police officer had stopped. He had been [84] handcuffed. So if there an arrest and it's not disorderly conduct, what is it for at that point?

MS. KAUFER: It could be several different things. One would be trespass after warning. Another –

THE COURT: Well, now let me stop you for a second. Trespass after warning. Let's assume that the chair of the commission said, You're out of order, stop. And let's assume that that can be interpreted to mean step away from the podium. Under the trespass after warning statute, does the police officer have to give the warning?

MS. KAUFER: Your Honor, Officer Aguirre did give the warning. He –

THE COURT: So – but answer my question. Is it the police officer who has to give the warning?

MS. KAUFER: Let me look at the statute. I think it just has to be any person who is authorized by the owner of the property –

THE COURT: But isn't that usually the police officer? I'm thinking of the case – remember we talked about this before. There are a lot of cases involving juveniles. It's interesting how particular statutes look like they have a more common application. So you've got several cases with people in public facilities, like in a library, and they're causing a commotion. And so the issue in some of those cases was whether the librarian, who would [85] have had the authority, she gave or he gave the – the direction to the police officer or the approval to the police officer to go ahead and tell this fellow to get out.

MS. KAUFER: Your Honor, the statute actually defines what a person authorized is. And it means an owner or lessee or his or her agent or any law enforcement officer whose department has received written authorization from the owner or lessee or his or her agent to communicate in order to depart the property in case of a threat to public safety. Obviously,

the members of the city council would certainly be agents of the city. And then you've got the law enforcement officer –

THE COURT: So you have's got the chair –

MS. KAUFER: – Officer Aguirre.

THE COURT: So you've got the chairperson concluding that the Rule of Decorum has been violated or the time has expired. I suppose it could be as simple as that. And the chair says, Okay, you need to move away. So there's the warning to step away from the podium. And the person doesn't do that.

MS. KAUFER: And then Officer Aguirre – in this case, in Mr. Lozman's case, Officer Aguirre before he put the handcuffs on him warned Mr. Lozman. He said, You need to come outside with me.

THE COURT: Right. He reinforces you need to come [86] with me.

MS. KAUFER: I gave the lawful – gave an order. Go outside with me. Mr. Lozman said, I'm not going anywhere. So at that point Mr. Lozman had been warned two times. He'd been warned by an agent of the city, and then he was warned by an officer of the city, who is defined in the statutes as a person authorized. Because Officer Aguirre is the police officer who is tasked with being the sergeant-at-arms and enforcing that meeting so –

THE COURT: We normally tend to think of trespass as being inside a facility or being on property. But I take it, it's your view as you're thinking about it, that you can apply it even in a more narrow setting, and it could be simply standing at the podium in this meeting when you have been told to leave the podium.

The chair is not telling you to step out of the chamber, they're just saying you need to leave the podium.

MS. KAUFER: And Officer Aguirre, when he approached Mr. Lozman before he put the handcuffs on – even if Your Honor is not persuaded that the city's interpretation of the podium itself as the area where the trespass occurred, Officer Aguirre, when he approaches Mr. Lozman before he puts the handcuffs on, he says, You need to go outside, meaning outside of the chambers. So even in a broader sense, Mr. Lozman was trespassing without warning within the – [87] within the chamber when the officer gave him the instruction to leave.

THE COURT: And take it, your view is you can violate the statute even though you're not being told to leave the premises, you're just being told to leave the podium area.

MS. KAUFER: Yes. And even if Your Honor is not inclined to take that view, the chambers itself. Because Officer Aguirre didn't just say to Mr. Lozman, You need to leave the podium. He said, You need to come outside with me.

THE COURT: Okay. A for effort. Have you found any case that supports your view of this?

MS. KAUFER: I have not, Your Honor. We would just rely on the language of the statute that I just read to you as to what a person authorized is.

THE COURT: Well, it sounds like – and you're saying – I mean when you think about it, you're saying that – you're really saying there's a difference between giving the warning – the statute seems to allow a non-law enforcement person to give the warning. Don't come on. And when you think about it, you know, we

all – we all see like those signs that people would put on property that says, Don't cross this fence.

So you're saying that someone who's had an invitation to come up, the invitation in a sense is [88] conditional. It's conditional that you won't extend the time – you won't exceed the time period. It's conditional in the sense that you'll abide by whatever rules have been established, and that that conditional invitation can be withdrawn. Now, there are cases that say there really has to be the warning. There has to be the warning to the person. And you're saying in this case, it's the chair who is the authorized person who says, Okay, now you're out of order, step aside.

MS. KAUFER: And Officer Aguirre himself he said – reiterates it.

THE COURT: But he – he really confirms it, doesn't it?

MS. KAUFER: Yes.

THE COURT: So you're saying you got a double – a double protection here because you've got the chairperson saying it, and then follows up by the police officer. And if the person doesn't do it, he can then actually arrest.

You know, it occurred to me – and again, I guess you can get all kinds of things like this. But the person who says, No, I won't go, and they grab the podium. I mean, what does the police officer do? Do they wrench someone's hands apart and take them away? At what point does the – does the refusal to leave rise to such a level that it literally can be enforced as a criminal violation rather than [89] simply enforcing the Rules of Decorum.

So okay. You're relying on trespass after warning. I guess we can all think about that.

MS. KAUFER: Yes.

THE COURT: What s the next one?

MS. KAUFER: Resisting – well, the title of the statute Resisting Arrest Without Violence, but the text of the statute makes it a criminal offense for any person to obstruct or resist by his words, conduct, or a combination thereof an officer who is engaged in the lawful execution of a legal duty.

In this case, Your Honor – and there's case law that says this. The lawful execution of a legal duty. The legal duty encompasses more than just the arrest. For example, an officer can be obstructed, and a person can be charged with resisting arrest without violence if they obstruct an officer who is, for example, investigating a 911 call or in the process of serving process or effectuating a detention. The city's position –

THE COURT: Well, not think about it for a minute. Those are traditional law enforcement duties, aren't they, that policemen or police officers enforce as a police officer? Now, if a police officer comes to a meeting of the city council, and the police officer is there in a sense to provide security, and they do it – they do it literally as [90] in the performance of their duties. They're there in uniform. They're being compensated. This is not a policeman, for instance, who is out on the street outside a private party who's been retained to help with parking, but the city has called upon him to provide security. So is it your premise that that does, in fact, constitute the performance of a legal duty?

MS. KAUFER: Yes, Your Honor. And it's our premise that Officer Aguirre was engaged in an execution of the legal duty when he went to the podium.

THE COURT: Okay. But hold on now for a second, and let's just look at that business about the legal duty. What cases have you found that to limit what defines the legal duty of the police officer? You've just told me you found some that talk about serving process; is that right?

MS. KAUFER: Yes, Your Honor. There's a Florida case – well, first of all, we cite to a Middle District case, the Gonzalez-Torres versus Buswell.

THE COURT: Just give me the cite.

MS. KAUFER: 2014 Lexis 41017.

THE COURT: Okay. What was the officer doing there?

MS. KAUFER: That we cited for the proposition that legal duty is encompassed more than just making the arrest. And let me turn to the page. [91]

THE COURT: When you think about it, the normal kind of thing you run into is a police officer arresting somebody. And you might have someone A) refusing to give their name or they fall down on the sidewalk and that sort of thing. But let's – let's explore this concept of legal duty. The officer performing a legal duty. Is that defined anywhere in cases that you have found?

MS. KAUFER: Yes.

THE COURT: You mentioned some.

MS. KAUFER: Yes, Your Honor. The AR versus State. It's a Florida case, 127 So.3rd 650. It states – it

gives some examples of what lawful execution of a legal duty include.

THE COURT: What are the examples that they talk about?

MS. KAUFER: Serving process, legally detaining a person, asking for assistance in an emergency situation, and investigating a 911 call.

THE COURT: Okay. So what you're really saying is maybe you haven't found a case right on point for this –

MS. KAUFER: Exactly.

THE COURT: – but your argument would be that – I mean, especially today, where security issues are certainly regarded as legitimate issues, that in a governmental meeting, having a police officer present to help maintain [92] order or enforce things, that that would be a legal duty. That's your beginning point.

MS. KAUFER: Yes, Your Honor.

THE COURT: And the evidence shows that the officer here was in uniform.

MS. KAUFER: Yes.

THE COURT: Was being compensated. He even talked about that. It was a special shift. And he's present. Where do we go from there? He's performing a legal duty.

MS. KAUFER: When he goes up to the podium and ordered Mr. Lozman to leave the city chambers. And that was before, again, he even placed the handcuffs on him.

THE COURT: Right.

MS. KAUFER: And Mr. Lozman said, I'm not going anywhere, and grabbed the podium. And at that point, he is obstructing within the definition of that statute. And it's Florida Statute 843.02. Because he's obstructing by both his words and his conduct, an officer, Officer Aguirre, who is engaged in the lawful execution of his legal duty, which is essentially the sergeant-at-arms, if you will, of the meeting, to remove public speakers when they have been ruled out of order.

THE COURT: That is interesting, isn't it? We agree that someone can be removed from the podium and that that is not placing the person under arrest, and they're [93] doing that pursuant to the direction of the chair. I suppose if someone laid a suit, the police officer, you know, and said you – you put your hand on me and you directed me out, we – you would have some immunity from that in the sense that he was doing it at the direction of the chair.

I think probably the legal issue we have to look at is, is a police officer who is in effect serving as a security component for a public meeting, is that the lawful performance of his legal duty, huh?

MS. KAUFER: Yes, Your Honor. And I'm still looking to see if I could find a case that holds that. I haven't found it yet.

THE COURT: But let – is there a statute that defines the legal duties of a duly enacted public – police officer? We know they have the – for instance, the one that comes up all the time is the right to arrest. Do you know that statute? Have you looked at that?

MS. KAUFER: I haven't looked at that specific statute, Your Honor. The actual statute on the

resisting arrest doesn't define what lawful execution of a legal duty is.

THE COURT: That's what it says, lawful execution of a legal duty?

MS. KAUFER: Yes. Yes, that is what it says. And so that's why we looked to the Florida case laws for examples [94] of what those could be. And it is clear that it encompasses much more than just actually making the arrest. That much is crystal clear. And so we would just argue that it would extend to an officer in the sergeant-at-arms context, who is trying to perform the duties that he was assigned. Because as Officer Aguirre testified, that is a particular duty that they put in for and are assigned. He's not there just tangentially on city business.

THE COURT: Right. He's not someone who's there to speak himself and then volunteers to step up. All right. Well, that's an interesting argument. What else do you have?

MS. KAUFER: We have disturbing a lawful assembly. And that one is perhaps the most on point. It's Florida Statute 871.011.

THE COURT: I'm sorry. 871 point?

MS. KAUFER: 011. It makes it a criminal offense for any person to willfully interrupt or disturb any assembly of people met for any lawful purpose. And –

THE COURT: Has that ever been construed by any court?

MS. KAUFER: Yes, Your Honor. The Middle District in the case of Hays vs. City of Tampa, 2014 Lexis 139752. Actually found that a police officer had

probable cause to arrest someone who was making a disturbance at a code enforcement board hearing. Under that statute they found [95] that the officer had qualified immunity in that the officer had arguable probable cause to believe that the person was violating that statute. There is –

THE COURT: That's interesting. Now think about it. Here's a court that has said arguable probable cause. And, of course, arguable probable cause is a defense, isn't it, to personal liability under certain things? But would a police officer have probable cause – there's a difference between arguable probable cause and probable cause, so –

MS. KAUFER: Well, Your Honor, for purposes of this case, at least for purposes of directed verdict, we will argue that Officer Aguirre had qualified immunity because there –

THE COURT: There is no qualified immunity in this case. He's not charged.

MS. KAUFER: There is case law out of the 11th Circuit, and I have it on my computer. Not here. But there's case law out of the 11th Circuit that says that if an officer had qualified immunity such that there was no constitutional violation, then you don't reach the Monell claim. So that it could be raised by the city in a case where an officer wasn't sued individually.

THE COURT: I'll have to take a look at that. I don't think that's the case here, though. I – he either has – there is probable cause and or there is not. So we [96] got to look at that.

Now let's – let's think about this for a minute. And again, looking at the facts of the case. You have a chairperson who says to the speaker, You're violating

the Rules of Decorum. You need to step aside. You need to stop and step aside. And the person doesn't do that. So the officer approaches and, in a sense, gives a warning. Come on now, you need to step aside. And the person refuses.

Read the statute again, if you would, and let's just take a look at it.

MS. KAUFER: The statute says whoever willfully interrupts or disturbs any school or assembly of people met for the worship of God or for any lawful purpose commits a misdemeanor of a second degree. And Florida state cases have defined assembly as a town council meeting. So that's clear.

THE COURT: Sure. How about the word disturb? In other words, what do you mean for disturbed? How has that been defined? Have we gotten to that yet?

MS. KAUFER: Yes. The case of SHB versus State. It's a Florida case, 355 So.2nd 1176. Says that to commit an offense under the section, a person must have deliberately acted to create a disturbance, meaning the – and then – well, it doesn't say meaning. It's number – that's one. And then two, the acts complained of must be such that a reasonable person would expect them to be disruptive. And [97] three, the acts must, in fact, significantly disturb the assembly.

And the city's position is that when Mr. Lozman refused to go out with Officer Aguirre and said, I'm not leaving, at that point he was deliberately acting to create a disturbance. He – a reasonable person would have known that refusing to go outside with the officer was going to create a disturbance. And then, as we all saw, the assembly was, in fact, disturbed because you

have Officer Aguirre who has to handcuff Mr. Lozman and bring him out –

THE COURT: And there's all the screaming and yelling.

MS. KAUFER: Yes.

THE COURT: And your point is you don't have to have chairs overturned or the podium knocked down. It's the – the normal flow of businesses had to be stopped and brought to a halt as the person is forcibly then removed by the police officer.

MS. KAUFER: Correct, Your Honor.

THE COURT: Do you have a fourth – I'm sorry. Was there something else you wanted to say?

MS. KAUFER: That is a Florida – the SHB versus State case that I referenced, that defines what specifically it means to create a disturbance. That's a Florida Supreme Court case. [98]

THE COURT: Uh-huh. Do you have another statute that you wanted to say?

MS. KAUFER: That was all of them. Those are all four. The disorderly conduct, which I understand the Court may not be inclined to give. The trespass after warning. Resisting arrest without violence, and the disturbing a lawful assembly.

It's the city's position that the jury should be instructed on all of those. And we've based our instruction on trespass after warning, resisting arrest without violence, and disturbing a lawful assembly off of the criminal pattern instructions from Florida, so –

THE COURT: Let me put this to you, though, and – are these issues that we put in front of the jury or does the Court simply instruct the jury that there was

probable cause or there was not probable cause? I mean, the facts of our case, when you think about it, are really not in dispute. We have – sometimes you have different accounts of what happened. But we've actually got the clip. We can see what happened. And we do have testimony. What is your view on that?

MS. KAUFER: I think, Your Honor, if – I think what the case law says, Your Honor, is that the Court can decide probable cause as a matter of law only where all of the facts are so crystalized that there is no dispute [99] whatsoever. And in this case Mr. Lozman hasn't testified yet, so we don't know what he's going to say yet and if that's going to be in conflict with anything that Officer Aguirre said. So I guess after Mr. Lozman testifies, then we're going to have to evaluate whether or not that decision can or cannot be made by the Court, but –

THE COURT: And I suppose also you get into that situation where you say no reasonable juror could find X or Y. I mean, this is one of those situations where we don't just have two people potentially saying two different things. Now, there may be some things we couldn't hear. So if you have the officer saying, I said this to Mr. Lozman, and it's not audible on the tape, maybe that creates something. But your view is that where you have two – where you have two accounts and they deal with disputed issues, it should go to the jury, huh?

MS. KAUFER: Correct, Your Honor.

THE COURT: So the city's view is that you want the jury instructed on these four or these three, whatever the number that would be appropriate, different statutes?

MS. KAUFER: Yes, Your Honor, because, as we know, the validity of the arrest doesn't charge on – doesn't turn on what was charged at the time of the arrest. Officer Aguirre needed only to have probable cause for something. So the city would instruct the jury on all four of those. [100]

THE COURT: Okay. Well, let me come to Mr. Lozman.

Mr. Lozman, what is your view? First, do you agree with the premise that the crime that you were actually arrested for does not determine anything as long as the officer had probable cause for some crime? Do you agree with that concept?

You want to come on up to the lectern for a moment.

MR. LOZMAN: With all due respect to Ms. Kaufer, who did a – certainly a nice job digging this all out, but I just think it's —

THE COURT: But let me put that question to you just so you can focus for a minute because it's kind of a foundational issue. Do you agree with the proposition that despite the fact that the police officer may have charged you initially with two crimes and then he changed one and so on, do you agree that as a matter of law, the real issue is did he have probable cause to arrest you for anything?

MR. LOZMAN: Exactly. If you can't – if he had no probable cause, you don't have to go any further.

THE COURT: Okay. But do you also agree with the concept that it can be for some statute that he wasn't even aware of at the time?

MR. LOZMAN: I'm going to say that they abandoned the trespass without – see, the city's practice was trespass with warning? [101]

THE COURT: Yeah. But come on back to what I just asked you. Because I hear what you're saying. Do you agree with the basic concept that as long as they can prove any crime, no matter what he was thinking of, that's good enough?

MR. LOZMAN: No.

THE COURT: Okay. All right. I'll look at that, but do I think that is the law. I do think that is the law. Now, you've just heard the city say they think there are four different statutes. Do you want to talk about any of those?

* * *

[1] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach
CASE NO. 9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff December 1, 2014

vs.

CITY OF RIVIERA BEACH,

Defendant.

TRIAL DAY 9

BEFORE THE HONORABLE
DANIEL T.K. HURLEY,
UNITED STATES DISTRICT COURT JUDGE

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* * *

[235:23]

[TESTIMONY OF PAMELA RYAN]

[RE-DIRECT EXAMINATION]

BY MR. LOZMAN:

Q. Is a city council meeting held for the benefit of the citizens?

[236]

A. The city council has to run the city. Those council meetings are primarily to operate in the sunshine and take care of the business of the city. Budgets, purchases, ordinances, it's to take care of the business of the city. The public is allowed to

participate. We want the public to come to those meetings, watch our meetings, comment on the meetings, but they are ultimately business meetings.

* * *

[1] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach
CASE NO. 9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff December 2, 2014

vs.

CITY OF RIVIERA BEACH,

Defendant.

TRIAL DAY 10

BEFORE THE HONORABLE
DANIEL T.K. HURLEY,
UNITED STATES DISTRICT COURT JUDGE

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* * *

[234:21]

[THE COURT]: I've been wrestling with this concept that the City has come forward with – dealing with the alleged false arrest. And if I understand the City's argument it is this: It doesn't make any difference what Mr. Lozman was actually arrested for. [235]

As a matter of law, if the police officer had probable cause to arrest him for any crime, then he would have had probable cause. So we don't – the analysis doesn't turn on what the police officer wrote on the charging document.

And the City suggested that there were three separate crimes that it was looking at, disorderly conduct, resisting an officer in the lawful performance, resisting, obstructing – there's a third word, I think, that goes with that. And then there was the statute of disturbing a public meeting.

MR. BEDARD: There was a fourth.

MS. KAUFER: There was a fourth, Your Honor.

THE COURT: Trespass after warning.

MS. KAUFER: Yeah.

THE COURT: I don't think that there is any evidence that would be sufficient to establish the crime of disorderly conduct. In other words, looking at the evidence – let me back up for a moment.

One of the interesting things of this case is we have got a video clip. We know exactly what happened on November 15th of 2006 because we have a video clip, with both sight and sound.

And if you look at that evidence and look at it in the light most favorable to the City, there's nothing there [236] that would establish the crime of disorderly conduct. The words did not rise to the level of fighting words and things like that, and there were no actions and so on that would constitute disorderly conduct.

I think Ms. Kaufer made a very interesting argument and an intriguing argument on the notion that the resisting a police officer and obstructing a police officer in the lawful performance of his duties, that that was a broad statute, has many applications.

And I think it's true, but virtually all of those applications involve a police officer in the performance

of law enforcement duties. And the courts have read that broadly, depending on the circumstances of what was taking place.

We have seen the case of the mother who called the police because her 12-year-old daughter was believed to be engaging in sexual activity with someone else, and the police come to the home, and their child becomes agitated, and the police are fearful that the child is going to, perhaps, assault the mother, and there is an effort to, you know, quiet the young girl down and by moving her – and the next thing you know, she's kicking or reacting against the police officers.

And when you think about that, it's a police officer involved in the investigation of a potential crime [237] and an escalating things and so on.

And the example I think of is a police officer who comes on a crime scene, and there's somebody standing nearby. And the police officer says to that person, You need to step aside, you need to step out of the way, and the person is resistant. That police officer is performing a lawful function in the course of his duties; he's preserving a crime scene and so on.

So the failure of someone to move in that situation, just the failure to abide by the law officer's duty, his direction, may well constitute the crime of obstructing a police officer and so on.

And I was thinking about what we have here. And, you know, we look at Officer Aguirre – am I pronouncing his name properly, the young officer who was there at the City Council meeting?

In all these other cases when we're looking at a police officer, the police officer is making a judgment, himself, about whether something is happening, and he's making a determination whether someone is violating one of the criminal laws or perhaps a traffic law of the State of Florida.

I'm looking at what took place here in the City Council meeting because we know that Commissioner Wade listened to Mr. Lozman, and Commissioner Wade concluded that [238] he was not speaking on topic. That's one explanation.

Mr. Lozman believes that she was disturbed because the people he was referring to, at least Mr. Masilotti, former Commissioner Masilotti, Palm Beach County Commissioner Masilotti, may have been a political friend of hers or colleague.

But it clearly is the commissioner who suddenly calls out to the officer and tells the officer to remove this person. And then, of course, the policeman ultimately puts handcuffs on Mr. Lozman when he won't move.

I don't think that the resisting and obstructing an officer applies in that situation because the officer, he's taking direction from the Council person. Now, my view is that if a police officer is called to the City Council chambers and he's in uniform, that's his duty. He clearly is providing or performing a function of law enforcement.

He's there to ensure that there's not a breach of the peace. And I think some of the cases talk about the fact that police officers are not only there to investigate crime, they're there to prevent crime. That's a

legitimate law enforcement function. So there's no question in my mind that, when Officer Aguirre was called to the City Council chamber, he was there to – in a law enforcement capacity.

I think the tougher question, though, is when he responds to the Chair's direction to, Tell that fellow to [239] move away from the lectern, is that a law enforcement function? I don't think it is.

It is more akin to a sergeant in arms who is enforcing, if you will, the directions of the Chair of a legislative body. And what we're trying to do is we're trying to fit in what happened here with the laws of the State of Florida.

Well, I want to go – so I really don't think, as a matter of law, that the resisting or obstructing a police officer applies to what happened here. In other words, looking at in the light most favorable to the City, I don't think the officer would have had probable cause to arrest for that purpose.

So then you get into how about disturbing the public meeting, and I think that's very much akin to the disorderly conduct. I think – and I'm not making a dispositive ruling on any of these, but I wanted to share with you where I am at this point. I think the conduct has to be somewhat akin to the disorderly conduct to meet constitutional standards.

So here is where I come down: I think that, when we look at what's happening in this City Council meeting, I think it's the trespass after warning statute that applies, and I recognize that he started out thinking that way, and he abandoned it, but that's neither here nor there. [240]

And I was really taken, as I've been thinking about this, with Ms. Ryan's reaction the other day in response to Mr. Lozman, you know, when she said, What is this? This is not a park. This is not a public forum. This is the City Council conducting its business. It's a – it is a limited – if I get the right term here, dedicated – it is – number one, it is a City Council meeting.

And as I said earlier today, absent a state statute or something else, there's absolutely no First Amendment requirement that a City Council open it up to public comment. It's the City Council conducting their business in the public. Now, there may be a state statute that says, You got to have a public comment section. But here is my point: A City Council, if it decides to, can create a limited dedicated public forum if it says, We're going to welcome public comment.

And so they can have an express invitation to the public to come forward and participate, but implied in that invitation is the concept that you're going to do it subject to our rules. For example, we're going to have a three-minute limit, that's completely reasonable, that's content neutral, and so on.

And I would suggest to you, in a limited dedicated public forum like this, you could have content limitations as well. I think one content – a good example would be on an [241] agenda item. You can only speak to the agenda item. We're trying to move forward and conduct the business of the City, and we want to talk about are we going to build an addition to the City Hall or not.

So the fellow who comes in and says, I want to talk about the youth league, and I'm all in favor of the

youth league – now, I suppose if he came in and said, Don't build the City Hall addition because we need to use the money for that, that would be a legitimate topic under the agenda item.

But the point is, clearly, the City Council has a right to say, on the agenda items, you've got to talk about the agenda item. By the same token, the City Council can have a rule that says – and it need not be, it may not be a written rule, but a rule that says, on the public comment, it has to be something that has some bearing on the business of the City, that, you know, you're here to talk about issues involving the City of Riviera Beach and that's what we're going to require.

Now, if the City can do that, and the City can have an express invitation to the public and, if indeed, there is an implication that the speaker, the public speaker is subject to the rules that the City Council enacts that are valid rules, – let's assume they're valid rules – then the Chair of the City Council certainly has a right to withdraw that invitation if the Chair concludes that the speaker is [242] not abiding by the rules.

If the Chair, having reached that conclusion, turns to the speaker and says, Sir, you're out of order, please leave the podium, if the speaker declines to follow that, certainly, the Chair has a right to turn to a law enforcement officer who is present in the facility and invite that officer to come forward and, just like the case of the policeman who comes to the public library where there are juveniles raising Cain and disturbing the atmosphere of the library, certainly the librarian can say to the police officer, You need to get those kids out of here, they're creating a disturbance, they're

inhibiting the other people's ability to use this public facility.

Well, I suggest to you that the Chair can turn to a law enforcement officer and say, I withdraw the right of that person to be at the podium, he's violating our rules. And if that police officer has received that authority from the City Council Chair, the police officer, it seems to me, is entitled under that statute, to turn to the person and say, You need to leave, I'm giving you a warning. And if the person doesn't accede to the officer's demand, he can be arrested for trespass after warning.

I think that's exactly what fits here. This is – number one, it's what happened. The police officer, he's a young police officer – doesn't make any difference, [243] he could be an experienced person – but he's there and the Chair or a – he's there in the chambers and he receives a request from the Chair.

He's not operating – he doesn't know whether the rule, you know, has been violated or not. The Chair is saying to him, The rule has been violated, tell that fellow to step aside. So what the officer is doing is saying, I'm giving you a warning, please step aside. If the person resists, it seems to me that's trespass after warning.

Now, I wish it were so simple. I mean, that's the statute that I think we're dealing with, and I think, as a matter of law, I'm leaning toward the proposition that I can rule that the other three have no application here, that looking at the evidence in the light most favorable to the City, it would not be grounds to support any one of those other three statutes, that is

an arrest for a violation of any one of those other three statutes.

But here is the problem – and we have got to think about this. The City Council operates under rules of procedure. The police officer has to receive direction from someone who had the authority to give that direction. I may be wrong about this, and I've gone back and looked at Councilwoman's Wade's testimony, I don't think she was either the Chair or the Vice Chair.

I don't think she had the authority to tell that [244] policeman to do anything. As I read it, and we have had a lot of testimony in here, it is the Chair or, in the Chair's absence, the Vice Chair who had the authority, if you will, as a matter of law, to withdraw the invitation to speak.

And, you know, the rules that came in today say that any member of the commission has a right to request the Chair to enforce the rules, so I think we have got a problem here of did this police officer get direction from someone who was authorized to give him that direction?

Now, there is a case, I think it's out of the Fifth District Court of Appeal – and I may be wrong, and it's the one I referred to earlier about the library – and apparently, in that case, you know, it's amazing how these cases with these statutes they seem to all involve juveniles, because they're lesser crimes, and they're the kind of things that juveniles might be involved in.

But in that particular case, the State proved everything except that the librarian had given the instruction to the police officer. And the Court said

that was required, that's an element, that he had received direction from either the owner or someone with authority to give that direction.

So the concept that you have to have the right direction from the right person, I think, is important. Now, there is a case that talks about actual or apparent [245] authority, and I'm looking at that, too.

MR. BEDARD: Well, plus, Your Honor –

THE COURT: Hold on, now. Hold on. I know I've been longwinded.

MR. BEDARD: I just wanted to interrupt. Ms. Kaufer has a baby, and she wants permission to leave.

THE COURT: Absolutely, of course, anytime. You know that, yes.

So I think we have got a problem here in whether that policeman had authority to do what he did. And my inclination is that, as a matter of law, he didn't have probable cause because he didn't have authority from the right person.

I mean, I want you to think about this and look at it, but I don't think a Council person can give that kind of a direction, I mean, if that's the statute we're dealing with, so I'd like your thoughts on this, to kind of think about it and see where we are.

I want to tell you, it bothers me that we could leave that policeman and say there's really not a law that he's capable of enforcing. It seems to me, on a practical basis, that a City Council has to maintain order, and there must be some law in the Florida statutes that covers this kind of a situation.

You know, I look, and I bet you've seen this, too. [246] Sometimes, you're looking at committee hearings of the United States Congress, you know, and someone stands up with a sign in the back and the – whoever they are, the Capitol Police descend on him and take him out.

And certainly, we hear people yell from the galleries, and that's immediately stopped by the Chair, and if necessary, people are expelled, but what we're looking at here is the right to arrest, you know, and what really is happening.

So here is my point: I'd like to ask you all to think a little bit about this. I have a suspicion that the fact that Ms. Wade did this, that I don't think she had the authority, there was a question whether the Chair was absent, and I think she testified that Vanessa Lee was the Vice Chair, and whether she was sitting there, I'm not sure we really focused on that.

So when we're talking about the unlawful arrest, I think that's what we're going to have to look at and then go from there.

So I just wanted to put that out for you to think about.

MR. BEDARD: Your Honor, could I give you one thing to think about? I don't want to argue.

THE COURT: Yes.

MR. BEDARD: But a criminal analysis versus a [247] probable cause analysis are different, and I think the officer, even if Ms. Wade did not have the authority to do it, if the officer had the reasonable belief because he was getting direction from the Council Chairperson, that satisfies probably cause.

THE COURT: But she's not the Council Chairperson.

MR. BEDARD: No, but he had a reasonable belief that we take direction from the Council if they ask somebody to step away from the podium.

THE COURT: I don't think that will do. It's a good argument, but I don't think that will do it, but let's talk more. I want to hear your thinking about it, and we all need to kind of move in the right direction.

And I hesitate to say this, but I want you to think about this, too. I would be concerned about making the wrong decision on probable cause and finding as a matter of law – let me back up.

I think the Court has an obligation if the facts are such, and they're not disputed, to tell the jury that I have found that the officer did have probable cause or didn't have probable cause. I'm concerned about making a wrong decision that the officer did have probable cause and then have an appellate court look at this and say, Wait a minute, that's the incorrect analysis, and you jumped the gun by doing that, or it should have been a jury question. [248]

I – I mean, there are various levels here. There is the Monell issue and various other things. But if Ms. Wade didn't have the authority to do what she did – and I want to think about what you said about his perceptions as to who is up there and what their roles are, but it would be better to find that there was no probable cause and let the jury go on and analyze the rest of that statute.

So let's think about it a little bit more, and if we can eliminate – if you feel, too, that we can eliminate

those other three statutes and put this statute in front of the jury, if that's what we have to do, that would be a better way to go. I'm trying to simplify this, but also to find something that really is correct in terms of what is the law here that applies.

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[1] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach
CASE NO. 9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff December 8, 2014

vs.

CITY OF RIVIERA BEACH,

Defendant.

TRIAL DAY 13

BEFORE THE HONORABLE
DANIEL T.K. HURLEY,
UNITED STATES DISTRICT COURT JUDGE

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[5:6]

[THE COURT]: I've begun to really look at the state statutes, and we have been talking a lot about trespass after warning. And one of the questions was whether the person who gives the direction, the presiding officer or a councilperson who says, please step aside from the lectern.

But you know, and I was just looking at the statute that I had been cited, which I think is the wrong statute, as I looked at it. It dealt with trespass after warning on property, not a structure.

Whereas the trespass on a structure and certainly the city council chamber would have to be considered

a structure simply requires the person authorized by the owner, presumably the presiding officer, but that becomes a question of termination, I suppose here, whether that person gives the direction, and then someone refuses to depart.

And whether that can be, if you will, the basis of then a police officer who is present and seeing that somebody at the lectern will not step away, whether that justifies a police officer in effectuating an arrest for failure of the speaker to step away from the podium after being told to. [6]

And the only reason I mentioned that is, in other circumstances, you have the police officer giving the warning. But I'm reading that statute correctly, it's not a police officer who gives the warning. It's the owner or the owner's authorized representative, whoever that might be.

And the other statute that I was looking at a little more carefully was the disturbance of a public assembly. And I suppose the first question is, is the city council meeting a public assembly within the meaning of that statute – because, obviously, it talks about religious services and other events like that.

And then I suppose the second question would be, does it incorporate the same concept that the person giving the order to step away is authorized? I would think it does. In other words, if you had someone who had no authority who told the speaker, please step away from the podium, I don't know how the failure to adhere to an unauthorized directive could constitute a disturbance.

So maybe somehow in that you incorporate the notion that the person giving the directive had the

authority to do whatever they said. And then I suppose the second question is, what constitutes a disturbance. And is that a factual question?

When a term is not defined and it's a term of ordinary usage, I guess you normally go to a dictionary. And [7] I suppose once you get that definition, the question here would be, presuming that Mr. Lozman had been given an authorized directive to step away from the podium, that he voiced an objection to doing that, that a police officer who was present in the assembly for the purpose of preserving the peace stepped up and asked him to please step away, and he declined to follow the officer's directive.

Whether those combination of facts, whether they can rise to the level of "disturbing," I think the statute uses the word "disturbs," so as to justify the officer at that point effectuating an arrest for disturbing a public assembly. I don't know.

But I ask you just to think about those, because we're going to have to come to grips, and then what – if they are, what are the jury questions? Is the jury question, you know, whether an officer confronted with all of that, whether that's the kind of disturbance that would justify an arrest?

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[272:11]

[THE COURT]: But we obviously need to get the jury instructions into final shape, and we'll have to have probably a couple more conferences. I'm still working on them myself.

And I'd like very much, if I can, to figure out how to handle the false arrest issue. I'm really thinking that the crime that we ought to focus on is the disturbing the public meeting.

Number one, I want to be sure that a city council meeting fills within that, and I understand that there's at lease [sic] one case that actually involves a city council meeting.

I'm interested in your thoughts about whether the order to depart – and I recognize that comes from the trespass statute, but I'm interested in your thoughts about whether we have to look at the direction that was given to Mr. Lozman was a legitimate direction.

[273]

I mean, it seems to me, when you're evaluating whether Mr. Lozman caused a disturbance, you have to look at the legitimacy of what he was doing. And then you get back into Ms. Wade and was she authorized to tell him to step away from the podium and so on.

I don't have an answer to that, but I think we need to talk about that. But it seems to me that is really – if we had to pick a statute, that really is the statute that I think is at play here.

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[1] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach
CASE NO. 9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff December 9, 2014

vs.

CITY OF RIVIERA BEACH,

Defendant.

TRIAL DAY 14

BEFORE THE HONORABLE
DANIEL T.K. HURLEY,
UNITED STATES DISTRICT COURT JUDGE

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[257:21]

[THE COURT]: I want to tell you by way of kind of a heads-up. I'm at the point where I'm well-satisfied that if there's any crime, it's the disturbance crime, disturbing a public meeting, public assembly, and my inclination is to allow the jury to make their own judgment call whether everything that [258] Officer Aguirre was observing whether that would give a reasonable officer in possession of all of those facts probable cause to believe that Mr. Lozman was creating a disturbance of that meeting sufficient to arrest him for that crime of disturbing a public meeting.

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[1] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach
CASE NO. 9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff December 11, 2014

vs.

CITY OF RIVIERA BEACH,

Defendant.

TRIAL DAY 16

BEFORE THE HONORABLE
DANIEL T.K. HURLEY,
UNITED STATES DISTRICT COURT JUDGE

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[51:6]

DIRECT EXAMINATION

BY MR. LOZMAN:

Q. Good morning, Mr. Davis. What is your profession?

A. **I'm a city councilman. I also work for the school district.**

Q. You're a city councilman for what city?

A. **City of Riviera Beach.**

Q. How long have you been a city councilman?

A. **Almost two years. Three months away from two years.**

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[57:4]

THE COURT: Right. I think what you're trying to ask, Mr. Lozman, is whether Mr. Davis knows whether there was any subject limitation regarding public comment between 2006 and 2010, if Mr. Davis knows that from his own personal knowledge.

A. **No.**

THE COURT: No, there wasn't or no, you don't?

A. **During public comments?**

THE COURT: Right.

A. **No, sir.**

THE COURT: No, what, though? You don't know or no, there was no limitation?

A. **There was no limitation to public comment.**

THE COURT: All right. All right. There you go.

BY MR. LOZMAN:

Q. Can you explain what no limitation mean?

A. **Just when you come to the microphone and you're speaking, you have your three minutes to really express yourself on how you feel about what's going on with reference to the City, community, just whatever is going on at that time. There is rules as far as how you – what you can say as far as profanity. But it's very open to what you want to speak to** [58] **public comment because the public – just come express yourself.**

Q. Can you talk about county issues?

A. **Yes.**

Q. Can you talk about if the Chinese wanted to send a rocket to the moon?

A. **Yes.**

Q. If you wanted to, could you go read a nursery rhyme for three minutes as long as you did not use profanity?

A. **As long as he doesn't exceed his three minutes.**

MR. LOZMAN: That's all I have.

* * *

[1] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach
CASE NO. 9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff December 15, 2014

vs.

CITY OF RIVIERA BEACH,

Defendant.

TRIAL DAY 18

BEFORE THE HONORABLE
DANIEL T.K. HURLEY,
UNITED STATES DISTRICT COURT JUDGE

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[147:22]

INSTRUCTIONS.

THE COURT: You must follow the law as I explain it even if you happen not to agree with the law, and you must follow all of the instructions as a whole. You must not [148] single out or disregard any of the instructions on the law. Now, the fact that a governmental entity or agency is involved as a party, must not affect your decision in any way.

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[156:12]

[THE COURT]: Now, in this case, Mr. Lozman is claiming that Riviera Beach officials and employees retaliated against him for engaging in constitutionally protected speech and conduct. So, in other words, Mr. Lozman is saying that at certain times, whether in City Council meeting or outside, it really doesn't make a difference, Mr. Lozman is claiming that he spoke against the marina redevelopment program. And Mr. Lozman is also saying that he spoke publically [sic] about his perception of corruption in the City of Riviera Beach. And he's also saying that he filed what we call a Government in the Sunshine lawsuit.

Now, everybody agrees that those kind of comments, whether they're done in the public, or if they're done in a City Council meeting, assuming they're done within the time [157] limits and so on, they are protected by the First Amendment of the United States Constitution. There's no question about that.

So, in this case Mr. Lozman is claiming that various city officials and employees, that they retaliated against him. They took action against him because he had engaged in constitutionally protected speech and constitutionally protected conduct.

Now, to prove that he was retaliated against in violation of his First Amendment rights, Mr. Lozman must prove all of the following elements by a preponderance of the evidence. That is more likely true than not true.

Number one) that he engaged in speech or petition conduct that was protected under the First Amendment.

Two) that a City official or employee intentionally took retaliatory action against him.

Three) that the City official or the employee acted under color of law when he or she retaliated against or punished Mr. Lozman, and four) that there was a causal connection between the retaliatory action and the protected speech or conduct. So there are four things that Mr. Lozman has to establish. Now I want to break those up and talk about them. Okay?

You remember the first is that Mr. Lozman engaged in constitutionally protected speech or conduct. I want to [158] instruct you that Mr. Lozman's public criticism of the City's proposed marina redevelopment project and any views he expressed about perceived public corruption in the City of Riviera Beach were protected under the First Amendment as was his conduct in filing a government in the Sunshine lawsuit against the City. So, therefore, that first element that I mentioned, that's been established. No more proof needs to come in on that. And both sides agreed with that. Both sides agree the first element has been established.

Now, the second is that a City official or employee intentionally took retaliatory action against Mr. Lozman. In other words, that either official or an employee did something to Mr. Lozman because they were trying to get back at him or punish him because he spoke against the marina redevelopment project or because he spoke about his perception of public corruption in Riviera Beach, or because he filed a government in the Sunshine lawsuit.

Now, on this second element, a retaliatory action is defined as one which would likely deter a person of

ordinary firmness from exercising his or her First Amendment rights. To decide whether an action constituted retaliatory conduct in the context of this case, you must determine whether the complained of action would deter a person of ordinary firmness from exercising their protected speech and/or engage in their protected conduct. [159]

A person of ordinary firmness means a similarly situated reasonable person in Mr. Lozman's shoes. I want to tell you this is an objective standard but in determining whether this standard has been met, the jury may consider whether Mr. Lozman himself was deterred from exercising his First Amendment rights.

Now, the third element, that the City official or employee was acting under color of law. Well, what does that mean? It really means that a City official or employee in doing whatever they did, they acted in the course of their employment as a governmental official.

Now, again, I want you to know that both sides agree that everybody who took any action in this case with one exception acted under color of law. And the one exception, and it creates a jury question for you folks to decide is Mr. Gilmour. You remember Mr. Gilmour, the golf cart driver? The question is, number one) did he do what Mr. Lozman claims he did? And if he did it, did he do it in his capacity as a City employee or was he just someone who was a tenant and just did something, but not as a City employee? So that's the one factual question. Other than that, everybody agrees that every other alleged actor acted under color of law.

And, of course, the fourth element is that there's a connection between a retaliatory animus and Mr.

Lozman's [160] protected speech or conduct. So to establish this fourth element, that is a causal connection between intentional retaliatory conduct and constitutionally protected speech, and/or conduct, Mr. Lozman must show that the City employee or the City official who was involved was subjectively motivated. In other words, what was in their mind that they were subjectively motivated to take the adverse action, the retaliatory action, because of Mr. Lozman's protected speech or conduct.

And you remember – I know I've repeated this a lot during the trial – the constitutionally protected speech and conduct is talking against the marina redevelopment, opposing that, talking about Mr. Lozman's perception of public corruption in Riviera Beach, and the filing of the Government in the Sunshine Act. Those are the three things that Mr. Lozman has alleged in his complaint were the constitutionally protected acts that he took.

To make this connection, it is sufficient to show that the protected speech or conduct was a substantially motivating factor for one or more of the alleged retaliatory acts.

Now, I want to be clear, and you will see when we go through this allegation of retaliatory conduct, they're just multiple of acts and each one has to be looked at individually. Each one has to be looked at individually. [161]

So I was saying that Mr. Lozman has to prove that the protected speech or conduct was a substantial motivating factor for one or more of the alleged retaliatory acts, that is, the impermissible animus does not have to be the only motivating factor, but it

must be a substantial one. A substantial motivating factor means a significant factor. That is one that played a substantial part in triggering the alleged retaliatory action.

If you find by a preponderance of the evidence that Mr. Lozman – that Mr. Lozman's protected conduct or speech was a motivating factor behind any one or more of the alleged retaliatory acts, then the burden shifts to the City to show that it would have taken the same action in the absence of protected conduct in which case the City cannot be held liable.

In considering Mr. Lozman's First Amendment retaliation claim, it can be subdivided into four parts and I'm going to talk about each one of them individually. As I listen to the evidence and as you listen to it and as I read Mr. Lozman's complaint, he brought a retaliatory claim, that is, he claims his First Amendment rights were violated because people acted in retaliation, but as you looked at it, there really are four separate categories and here is how I divide them.

* * *

[176:4]

[THE COURT]: We're getting close to the end of retaliation and we're talking about what happened in that City Council meeting on November 15, 2006. You remember that City Council meeting? I think Council woman Wade was presiding at the meeting and Officer Aguirre – how do you pronounce the gentleman's name?

MR. BEDARD: Aguirre.

THE COURT: Aguirre. Officer Aguirre arrested Mr. Lozman. Now, I want you to know as a matter of law, an arrest occurs the minute somebody has been restrained and there's no question that when that police officer put the handcuffs on Mr. Lozman as a matter of law, that constituted an arrest. A reasonable person would know at that point they were not free to move away or so on. So there's no question, we all agree Officer Aguirre, he did arrest Mr. Lozman. But let's talk about this concept of false arrest. And I hope it's not too confusing because Mr. Lozman has alleged it really twice in this case, and that's totally appropriate, there's nothing wrong, but first in this instance, Mr. Lozman is alleging that the policeman arrested Mr. Lozman as a retaliatory measure.

Do you remember in all these retaliation claims [177] we're looking at what's in the mind of the actor? What's in the mind of the City Council person? What's in the mind of the person who initiates the admiralty proceeding? What is in the mind of the arresting officer when he turned to arrest him?

Mr. Lozman is claiming in this particular claim that the police officer had a retaliatory motive to strike back at Mr. Lozman because Mr. Lozman had engaged in constitutionally protected speech, speaking against the marina, speaking about public corruption, in Riviera Beach, and filing that Government in the Sunshine action.

So in order to prove that he was retaliated against in violation of his First Amendment rights, Mr. Lozman, as I've said repeatedly, he needs to prove all of the elements listed on page 5 for retaliation. And then there's one additional element that he has to prove. He has to prove that Officer Aguirre, the

arresting officer, lacked, that he did not have what is called probable cause to believe that Mr. Lozman had or was committing a crime. Let me go through this.

Mr. Lozman has to prove, number one) that he had engaged in speech or conduct protected by the First Amendment. We all agree that he did that in the past. That he engaged in it. And you can decide whether he was engaging in protected speech at that particular meeting. [178]

Second) Mr. Lozman has to prove that Officer Aguirre, the Riviera Beach police officer who arrested him, that he was motivated to take this action, that is, he was motivated to arrest Mr. Lozman because the police officer had an impermissible animus, an impermissible motive to retaliate against Mr. Lozman for having engaged in constitutionally protected speech or conduct, and third) that the arresting officer acted under color of law, and fourth) that the arresting officer lacked probable cause to believe that Mr. Lozman had or was committing a crime.

I told you repeatedly we all agree that Mr. Lozman's speech criticizing the marina development, speech about perceived public corruption in Riviera Beach, and his action in filing the Government in the Sunshine suit, no question that's protected. I've previously talked about the concept of retaliation and that applies here.

Again, there's no question that the police officer when he made that arrest, he was acting under color of law. He had the right as a police officer to effectuate an arrest, so when he does it he's acting under color of law.

The real question is, did he have the right to arrest Mr. Lozman? Did he have the legal justification to arrest Mr. Lozman? Let me tell you this, a police officer can arrest a person if the police officer has what is called probable cause to believe that the person has committed or is [179] committing an offense.

An officer has a probable cause to arrest a person without a warrant when, under the facts and circumstances within the officer's knowledge, based on reasonably trustworthy information, would cause a reasonable police officer to believe that a person has committed, is committing or is about to commit a crime.

Now I want you to know that the standard here is called an objective standard. You remember I said we're looking at what a reasonable police officer would have done so we're really not looking into Officer Aguirre's mind. But we're looking and we're saying what would a reasonable police officer who saw everything that was happening at that event would that police officer have had probable cause to arrest Mr. Lozman? Would that police officer have had probable cause to believe that Mr. Lozman had committed, was committing, or was about to commit an offense? Well, you may say, what offense are we talking about, what conceivable offense could have existed, and I want to instruct you on this point on Florida law.

Under Florida law any person who willfully interrupts or disturbs any assembly of people met for any lawful purpose commits what is called a crime of disturbing a lawful assembly. I want to instruct you, first, that a City Council meeting is, in fact, as a

matter of law, a lawful [180] assembly within the meaning of this statute.

For a police officer to have probable cause to arrest a person for the crime of disturbing a lawful assembly, the police officer must have reasonable grounds to believe, number one) that an individual was acting with the intention that his behavior impeded the successful functioning of the assembly, or with reckless disregard of the effect of his behavior.

Two) that the individual's acts were such that a reasonable person would expect them to be disruptive. And three) that the individual's acts did, in fact, significantly disrupt the assembly.

I want to be very clear. Disturbed does not mean simply annoy somebody. That's not good enough at all. We're talking about acts that significantly disrupt a public assembly. And when you think about, we're really stepping back a minute and we're saying, did that police officer when he made the decision – or excuse me, we're not saying that. We're saying would a reasonable police officer who viewed everything that was taking place, would that police officer have grounds to believe that Mr. Lozman, by his acts, was causing a significant – that he was willfully causing a significant disruption of that public assembly of that meeting. That's what – and we're looking at what would – would a reasonable police officer have that. [181]

Now, it's Mr. Lozman's burden to prove in this case that a reasonable police officer would not have come to that conclusion. It is Mr. Burden – Mr. Lozman's burden on this particular claim to prove that the police

officer did not have probable cause and he lacked probable cause.

As I've said repeatedly, if Mr. Lozman does not prove all of the elements on page 5, for retaliation, plus on this one, lack of probable cause, then he's not established his claim. If he has proven all of those, including probable cause, then you go on to consider whether there is grounds to hold the City liable and I'm going to come to that.

* * *

[199:25]

[THE COURT]: Now we're turning to a very important concept, and [200] I say it's important because it's kind of different from what we normally have experienced in life. You remember I mentioned a couple of times that in ordinary circumstances, if an employee of a company does something and they're negligent, the company is responsible for their negligence. The legal term of that is called respondeat superior or sometimes they call it vicarious liability. It just means the employer is responsible for what the employees do if it's done in the course and scope of its employment. It makes good common sense, but because we're dealing with municipalities, the Supreme Court has carved out some very, very special rules that deal with what has to be established before a municipality would be held liable for a constitutional violation that is caused by one of its employees.

In other words, a City employee, if they commit a constitutional violation, if they violate someone's rights. Now, of course, the first analysis would be did they violate the rights in the first place, that's for you

to decide. But there are very special rules that come into play that if someone's rights were violated, what must be established before we will hold a municipality liable for that violation? This only applies to the constitutional claims. It only applies to the three constitutional claims in this case.

So let's talk about this in a little more detail. [201] Mr. Lozman claims that the City of Riviera Beach is responsible for any and all of his constitutional rights being violated by one or more officials or employees of the City of Riviera Beach. If the jury finds that Mr. Lozman has failed to prove one or more constitutional violations, then you need not consider the question or issue of municipal liability.

However, if you find that Mr. Lozman has established one or more constitutional violations, then you must consider the issue of municipal liability as it applies to each and every constitutional violation.

Do you remember when I said in the retaliation area you need to look at every single act and make a judgment as to whether Mr. Lozman has proven all of the elements regarding that particular person, that particular act?

Well, the same thing holds true on municipal liability. In other words, if you have found a constitutional violation, then you need to go through this analysis regarding the municipal liability as to each individual act. You can't group them together. You've got to look at them one by one by one and make your judgment. You must engage in this analysis separately and independently for each and every constitutional violation that you might find.

The City of Riviera Beach is not liable for [202] violating Mr. Lozman's constitutional rights simply because it employed the official or employee who took down the complaint – who took the complaint of action against Mr. Lozman.

So, in other words, this is radically different from how we hold a company liable if one of its employees engages in a negligent act. The Supreme Court has said that we need to treat municipalities differently, and so they are not liable simply because they happened to employ the person who committed a constitutional violation.

Rather, the City of Riviera Beach would be liable to Mr. Lozman only if Mr. Lozman proves that an official policy or custom of the City of Riviera Beach directly caused his injuries. Put another way, the City of Riviera Beach is liable if its official policy or custom was the moving force behind Mr. Lozman's injuries.

Well, let's first look at what is an official policy or custom. That means, first, a rule or regulation created, adopted or ratified by City Council of Riviera Beach or a policy statement or decision by the City of Riviera Beach's policy maker. In this area – one of the key words in this area of the law is who is the policy maker? We all agree that for a redevelopment plan, the policy maker is its City Council. Okay. And I'm going to come back to that and explain a little bit more about that. [203]

So a policy statement or decision made by the City of Riviera Beach's policy maker, i.e., the City Council. And C) a practice or course of conduct that is so widespread that it has acquired the force of law even if the practice has not been formally approved.

You may find that an official policy or custom existed if there was a practice that was so persistent, widespread or repetitious that the City of Riviera Beach's policy maker either knew of it or should have known of it.

Okay. I've talked about the City of Riviera Beach's policy maker. Let's focus on that. The City Council of Riviera Beach is the policy maker for the City of Riviera Beach. And the concurrence of a majority of the City Council is required to enact a policy or ordinance of the City. In assessing whether the City Council harbored the requisite retaliatory animus, I want to instruct you that Mr. Lozman must prove that three out of five Council members who directed, authorized or agreed to the conduct that Mr. Lozman is complaining of, harbored an impermissible animus or motive. That is, that each of those Council members intended to retaliate against Mr. Lozman for having engaged in constitutionally protected speech or conduct.

Another way that Mr. Lozman may establish the liability of the City for the conduct of its officials or employees is by showing that the City Council ratified a [204] constitutional violation, committed by a city official or employee.

To establish municipal liability under this theory, Mr. Lozman must prove each of the following elements by a preponderance of the evidence. First) that a City official or employee deprived Mr. Lozman of his rights under the Constitution. Second) that the City official or employee acted under color of law. Three) that the City Council also acted under color of law, and Four) that the City Council ratified the officials or the employee's act and the basis for it. And by ratification

I mean that the City Council knew and specifically approved of the employee's acts and the employee's discriminatory animus.

So for ratification to exist, the City Council needs to know what the employee did, that the employee acted with a discriminatory animus, and that the City Council acted with a discriminatory animus in allowing it to go forward.

If you find that Mr. Lozman has proved all of the elements required to prove municipal liability under any one or more of the theories that I've mentioned, and if you find that the plaintiff has proved all of the elements that he is required to prove to establish one or more of the constitutional violations at issue in this case, then your verdict should be for Mr. Lozman on that particular constitutional claim and you should proceed to consider the [205] matter of damages.

If, on the other hand, the plaintiff has failed to establish each of the elements required to establish municipal liability for a constitutional deprivation under at least one of the theories that I mentioned on municipal liability, then your verdict should be for the defendant City on all of the constitutional claims.

* * *

[1] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach
CASE NO. 9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff December 16, 2014

vs.

CITY OF RIVIERA BEACH,

Defendant.

TRIAL DAY 19

BEFORE THE HONORABLE
DANIEL T.K. HURLEY,
UNITED STATES DISTRICT COURT JUDGE

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* * *

[2:1]

PROCEEDINGS

(The following proceedings were held in open court.)

* * *

[32:18]

[THE COURT]: The other thing, and I hope I mentioned this to you, but in this case, you know, there is, as I said, a series of claims, and we want to ask you to look at each claim all by itself, make up your mind on that claim, and then move onto the other.

We recognize that there are some common issues in the claims and obviously you can consider how you

view that issue previously as you're moving on, but we want to ask you [33] to please look at each claim all by itself, you make up your mind whether that claim has been established. You make up your mind whether, if it has been established, whether municipal liability, a ground for municipal liability has been established. And if you answered both yes to those, then you would move on to the issue of damages.

* * *

[56:10]

VERDICT

COURTROOM DEPUTY CLERK: United States District Court, Southern District of Florida, Case No. 08-80134 Civil, Fane Lozman versus the City of Riviera Beach, a Florida municipal corporation.

On the claim for First Amendment retaliation, did the plaintiff, Fane Lozman, prove by a preponderance of the evidence that the City official or employee retaliated against him in violation of his First Amendment rights as alleged in segments A, B, C and/or D, and that the City of Riviera Beach is liable for the retaliatory action based on one of the grounds for municipal liability as instructed by the Court? Answer: No.

On the claim for violation of the Fourth Amendment, did the plaintiff, Fane Lozman, prove by a preponderance of the evidence that a municipal police officer deprived [57] Mr. Lozman of his rights under the Fourth Amendment by arresting Mr. Lozman without probable cause, and that the City of Riviera Beach is liable for the Fourth Amendment

violation based on one of the grounds for municipal liability as instructed by the Court? Answer: No.

On the claim for violation of the Fourth Amendment —

THE COURT: Fourteenth.

THE COURTROOM DEPUTY: – the Fourteenth Amendment, did the plaintiff, Fane Lozman, prove by a preponderance of the evidence that the City official or employee violated his rights under the Fourteenth Amendment by initiating an admiralty action to target and punish Mr. Lozman for having engaged in constitutionally protected speech and conduct, and that the City of Riviera Beach is liable for the Fourteenth Amendment violation based on one of the grounds for a municipal liability as instructed by the Court? Answer: No.

On the state law claim for unlawful arrest, did the plaintiff, Fane Lozman, prove by a preponderance of the evidence that a municipal police officer initially and illegally retained Mr. Lozman without probable cause on November the 15th, 2006? Answer: No.

On the state law claim for battery, excessive force, did the plaintiff, Fane Lozman, prove by a preponderance of the evidence that a municipal police officer [58] in arresting Mr. Lozman on November the 15th, 2006, used excessive force? Answer: No.

So say we all, dated the 16th day of December, 2014, at the United States Courthouse, West Palm Beach, Florida.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 08-80134-CIV-DTKH

FANE LOZMAN,

Plaintiff,

v.

CITY OF RIVIERA BEACH, a Florida Municipal Corporation,

Defendant.

_____/

VERDICT

We, the jury, unanimously find as follows:

On the claim for First Amendment retaliation:

1. Did the Plaintiff, Fane Lozman, prove by a preponderance of the evidence that a city official or employee retaliated against him in violation of his First Amendment rights as alleged in segments (a), (b), (c) and/or (d), and that the City of Riviera Beach is liable for the retaliatory action based on one of the grounds for municipal liability as instructed by the court?

Yes _____ No ___X___

(If you answered "No" to the above question, please skip the questions 1(a), 1(b), 1(c) and 1(d) and go to question 3 below. If you answered "Yes" to the above question, please answer questions 1(a), 1(b), 1(c) and 1(d) below.)

1(a). Did the Plaintiff, Fane Lozman, prove by a preponderance of the evidence that a city official or employee retaliated against him in violation of his First Amendment rights as alleged in subsection "a" and that the City of Riviera Beach is liable for the retaliatory action based on one of the grounds for municipal liability as instructed by the court?

Yes _____ No _____

1(b). Did the Plaintiff, Fane Lozman, prove by a preponderance of the evidence that a city official or employee retaliated against him in violation of his First Amendment rights as alleged in subsection "b" and that the City of Riviera Beach is liable for the retaliatory action based on one of the grounds for municipal liability as instructed by the court?

Yes _____ No _____

1(c). Did the Plaintiff, Fane Lozman, prove by a preponderance of the evidence that a city official or employee retaliated against him in violation of his First Amendment rights as alleged in subsection "c" and that the City of Riviera Beach is liable for the retaliatory action based on one of the grounds for municipal liability as instructed by the court?

Yes _____ No _____

1(d). Did the Plaintiff, Fane Lozman, prove by a preponderance of the evidence that a city official or employee retaliated against him in violation of his First Amendment rights as alleged in subsection "d" and that the City of Riviera Beach is liable for the retaliatory action based on one of the grounds for municipal liability as instructed by the court?

Yes _____ No _____

2. If you answered "Yes" to question 1(a), or 1(b) and/or 1(d), please list the amount of compensatory or nominal damages to be awarded to Mr. Lozman.

$ _____ – Past pain and suffering (incident on 10/21/2009)

$ _____ - Nominal damage of $1.00 for each constitutional violation

On the claim for violation of the Fourth Amendment:

3. Did the Plaintiff, Fane Lozman, prove by a preponderance of the evidence that a municipal police officer deprived Mr. Lozman of his rights under the Fourth Amendment by arresting Mr. Lozman without probable cause, and that the City of Riviera Beach is liable for the Fourth Amendment violation based on one of the grounds for municipal liability as instructed by the court?

Yes _____ No ___X___

(If you answered "No" to the above question, please skip the next question and go to question 4 below. If you answered "Yes" to the above question, please answer question 3(a) below.)

3(a). If you answered "Yes" to question 3, award Mr. Lozman nominal damages in the sum of $1.00.

$ _____

On the claim for violation of the Fourteenth Amendment:

4. Did the Plaintiff, Fane Lozman, prove by a preponderance of the evidence that a city official or employee violated his rights under the Fourteenth Amendment by initiating an admiralty action to target and punish Mr. Lozman for having engaged in

constitutionally protected speech and conduct, and that the City of Riviera Beach is liable for the Fourteenth Amendment violation based on one of the grounds for municipal liability as instructed by the court?

Yes _____ No ___X___

(If you answered "No" to the above question, skip the next question and go to question 5 below. If you answered "Yes" to question 4 OR you answered "Yes" to question 1(c), please answer question 4(a) below.)

4(a). If you answered "Yes" to question 4 OR to question 1(c), please list the amount of money Mr. Lozman is entitled to receive as compensation for the fair market value for his floating home and to compensate him for attorney's fees incurred to appeal the admiralty court's decision.

$ _____ –for the floating home

$ _____ –attorney's fees

On the State law claim for unlawful arrest:

5. Did the Plaintiff, Fane Lozman, prove by a preponderance of the evidence that a municipal police officer intentionally and illegally restrained Mr. Lozman without probable cause on November 15, 2006?

Yes _____ No ___X___

(If you answered "No" to the above question, please skip the next question and go to question 6 below). If you answered "Yes" to question 5, please answer question 5(a) below.)

5(a). Please specify the amount of money Mr. Lozman is entitled to receive for having been intentionally and illegally restrained.

$ _____

On the State law claim for battery (excessive force):

6. Did the Plaintiff, Fane Lozman, prove by a preponderance of the evidence that a municipal police officer, in arresting Mr. Lozman on November 15, 2006, used excessive force?

Yes _____ No ___X___

(If you answered "No" to the above question, please skip the next question and sign and date the verdict form. If you answered "Yes" to question 6, please answer question 6(a) below.)

6(a). Please specify the amount of money Mr. Lozman is entitled to receive for having been subjected to excessive force.

$ _____

SO SAY WE ALL.

Dated this 16 day of December, 2014, at the United States Courthouse in West Palm Beach, Florida.

s/ [redacted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 08-80134-CIV-HURLEY

FANE LOZMAN,

Plaintiff,

v.

CITY OF RIVIERA BEACH,

Defendant.
_____/

FINAL JUDGMENT

THIS CAUSE came before the Court and a jury, the Honorable Daniel T. K. Hurley, presiding, resulting in a jury verdict in favor of the defendant on December 16, 2014 [ECF 728].

The issues having been duly tried and the jury having duly rendered its verdict in this matter, it is now **ORDERED AND ADJUDGED**:

1. The plaintiff, **FANE LOZMAN**, shall take nothing by this action, and the defendant, **CITY OF RIVIERA BEACH**, shall go hence without day.

2. The court reserves jurisdiction to determine the issue of taxation of costs.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 18th day of December, 2014.

_____
Daniel T. K. Hurley
United States District Judge

cc. all counsel
Fane Lozman, *pro se*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 08-CIV-80134-HURLEY

FANE LOZMAN,

Plaintiff,

v.

CITY OF RIVIERA BEACH,

Defendant.

_____/

FILED by MM D.C.
SEP 11 2015
STEVEN M. LARIMORE
CLERK, U.S. DIST. CT.
S.D. of FLA – MIAMI

PLAINTIFF'S NOTICE OF FILING TRIAL EXHIBITS FOR PURPOSES OF APPEAL

Plaintiff Fane Lozman hereby files this Notice of Filing Trial Exhibits for Purposes of Appeal and certifies that the below listed and attached exhibits are the same or identical to the exhibits submitted at trial. These exhibits are being filed for purposes of use and reference for the present appeal of this case. The exhibits are as follows:

1. Plaintiff's Trial Exhibit No. 1, transcript of City of Riviera Beach executive session.

* * *

Respectfully Submitted,

FANE LOZMAN
By: /S/

Fane Lozman
2913 Avenue F
Riviera Beach, Florida 33404
Phone: (786) 251-5868
sp500trd@yahoo.com

EXHIBIT 1

Plaintiff's Trial Exhibit No. 1, transcript of City of Riviera Beach executive session

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* * *

[1]IN RE: SCHEDULED CLOSED EXECUTIVE SESSION

CASE: FANE LOZMAN AND VIRGINIA MERCHANT VS. CITY OF RIVIERA BEACH

CASE NO.: 502006CA005632XXXXMBAD

SPECIAL COUNSEL: DON STEPHENS, ESQUIRE

* * *

Wednesday, June 28, 2006
Riviera Beach, Florida
5:47 p.m. – 6:50 p.m.

APPEARANCES:

ANN ILES, CHAIRPERSON, DISTRICT 5

JAMES "JIM" JACKSON, CITY COUNCILPERSON, DISTRICT 4

ELIZABETH "LIZ" WADE, CITY COUNCILPERSON, DISTRICT 3

NORMA DUNCOMBE, CITY COUNCILPERSON, DISTRICT 2

VANESSA LEE, CHAIR PRO TEM

PAMELA H. RYAN, CITY ATTORNEY

WILLIAM E. WILKINS, CITY MANAGER

MICHAEL D. BROWN, MAYOR

MAUREEN HALL, COURT REPORTER

[2]

(Thereupon, the following proceedings were had):

— — —

MS. ILES: Okay. Are you ready now?

Okay. Ladies and gentlemen, we are getting the show on the road. Do I have to say anything?

MS. RYAN:We have to open up a regular meeting.

MS. ILES: Oh.

MS. RYAN:And then close it for the closed executive session.

MS. ILES: Okay. I call this regular special meeting to order at 5:47, Wednesday, June 28, and we don't need roll call, do we?

MS. WADE: Do we recess or close?

MS. RYAN:Let me just say, present at this special meeting are councilpersons Duncombe, Jackson, Wade and Chairperson Iles.

In addition, the city manager, the city attorney and special counsel Don Stephens.

Now you can just close the meeting.

MS. WADE: Close or recess?

MS. RYAN:Close.

MS. WADE: I move to adjourn.

MR. JACKSON: Second.

[3] MS. ILES: Okay. Moved and seconded. We are now adjourned. We are going to open up our closed executive session.

Okay. Got to do roll call again.

MS. RYAN:Present are the same persons who were at the —

MS. ILES: Special.

MS. RYAN:— special meeting.

Madam chair, we are here to discuss two new lawsuits that have been filed against the city and one against the CPA, in addition to the city. We will take them in turn.

The first one we will discuss is Fane Lozman and Virginia Merchant versus the City of Riviera Beach. We have already retained special counsel, Don Stephens, who will give us a brief summary of the case, and we will discuss our strategy.

We are looking for some strategy recommendations from the council in this case, and we will be doing the same thing on the second case as well.

We will go ahead and start with the case that was just filed against us; as you know, as it relates to the May 10, 2006 special city council meeting. [4]

MR. STEPHENS: Good evening.

MS. ILES: Good evening.

MR. STEPHENS: I don't know how much information you all want, but I am just going to try to break it down as succinctly as I can.

Basically, Lozman and Merchant filed a lawsuit that is somewhat confusing. It is really a lawsuit

pursuant to violation of the Sunshine Statute or Sunshine Law, but they also ask for declaratory relief and injunctive relief.

So, what we have done is we filed a motion to dismiss the lawsuit, because the issues regarding declaratory, they didn't allege the proper elements to state a cause of action for declaratory relief, nor did they allege the proper elements for a permanent injunction, which is what they are trying to do.

It is clear what they are trying to do. I mean, they are basically saying, because the May 10 meeting didn't give them enough notice, they want The Court to step in and declare, number one, that the resolution and the contract are void, but they also want The Court to issue a permanent injunction prohibiting the council from entering into such agreement.

[5] And they are not dealing with the new bill that the governor signed, but they are, in a sense, saying that this meeting was sort of hastily and quickly.

You know, basically what they are trying to do is say this meeting was put together without giving proper notice in order to beat the governor in signing that bill.

And in researching some of the cases, there are no — there are no cases that say that the 24 hour notice you gave would be adequate notice, and there is no cases that say the 24 hours you gave would be inadequate.

There are cases that say an hour-and-a-half notice is inadequate, and there are cases that say three days notice is adequate, but you certainly not only just gave

notice in terms of posting things, but that was also the way that things were routinely done.

That was also — in fact, in speaking with the clerk, she also said that she actually faxed a notice to the Palm Beach Post. She also said that on Channel 18 that the notice was also typed into, would come up on Channel 18, so everyone within the city can look on there and see that there was [6] a meeting coming up.

Not only that, the notice was passed out at the CRA meeting, and one of the guys who was complaining is Fane Lozman. He was at the CRA meeting, and one of the grounds for our dismissal was that he actually got actual notice.

There is a case that says, if someone has personal notice, then they can't file a lawsuit saying that they didn't get notice or that the Sunshine Law was violated.

So, I mean, the city really has — I mean, you know, I can't promise you that The Court is going to agree with me, but the city really has given notice, and the city did not, you know, just have a meeting with one little piece of notice posted out front.

I mean, there was — the notice was passed around to different people's offices. It was on TV, you know, and it was sent to The Post. The Post could have, actually could have called the press, if they wanted to call the television stations, or they could have posted something in their newspapers the next morning.

So, you know, this is one of those cases where they really are upset, obviously, because of [7] what is at stake, and the case law is that you have to give reasonable notice no matter what the meeting is.

Just because this is a very important issue doesn't mean that you got to give some special notice because of the gravity of what we are dealing with.

So, these people were saying basically because of what we are dealing with, that you should have given them a week's notice. But most of the arguments, quite frankly, that they were making or would be making, some of these same people made those arguments in front of you at the CRA meeting.

So, I mean, I think that what this is going to boil down to is the Judge is going to have to make a decision as to whether or not the notice that was given, whether or not that was reasonable notice.

And I, you know; and again, I think that, you know, this is not something that was done just for this situation, which I think is good.

I mean, I think the city has been doing the same type of notice for a period of time, and the city didn't deviate with this matter at all.

[8] I mean, it — you know, they are not asserting —

I mean, they are not showing anything, or they haven't alleged anything that which would prove to me or anyone else that you went out of your way to have a secret meeting, which is what most of the Sunshine violations are for is when two people go have lunch together and start talking about what they are going to do at a public meeting. That didn't happen here.

There are no such allegations, and I think one of the strong points is this, and that there is a Sunshine manual that is published I believe by the Attorney General's office that said, if you are going to call a

special meeting, you have to give at least 24 hour notice.

So, you have met those things, I mean; but, you know, obviously, this is going to boil down to whether or not a Judge believes that you gave reasonable notice.

I don't believe that they are going to be able to cite to anything specific to show that the notice was unreasonable, and I don't believe we are going to be able to cite to anything to show that we absolutely did the right thing.

[9] I think it is going to boil down to a Judge looking at this and making a determination but —

MS. WADE: I have a statement. The meeting preceding, I think it was the CRA meeting where it was discussed, and the mayor said we could call a special meeting.

MS. DUNCOMBE: Public meeting.

MS. WADE: A public meeting.

MR. STEPHENS: Right.

MS. WADE: That was stated in front of Mr. Lozman and all of the petitioners except the lady from the Sea Shell. But I don't know who she is.

MR. STEPHENS: I think you actually said that there was another meeting following, because I recall, from listening to the tape, that — I think it was Councilmember Lee was saying that maybe there was not going to be something that was going to happen afterwards, but then I think you interrupted her and said no, that's not right.

MS. WADE: Yeah.

MR. STEPHENS: But, anyway, Mr. Lozman states in this that he got notice at the CRA meeting that there was a meeting, so I think anybody who is at the CRA meeting knew that there was a meeting. [10]

MR. LEE: Excuse me. Let me interrupt you. The mayor, Michael Brown, came in.

MS. WADE: The point I am making is, they are alleging the Sunshine violation, and my recollection of all that I have gone through here at the city, like you said, it has to be two or more meetings to discuss what we are going to vote on.

The meeting, in essence, for the city, was called by one person, so we can't say Sunshine there, because the mayor has that authority.

I was not necessarily in favor of the meeting, but I attended the meeting, and I worked with you all, because that's what we are trying to do. It was known from the time we left Tallahassee as to what the city had to do, and as far as the Sunshine violation now, I have personally seen Mr. Lozman with the Roberts Rule and the Sunshine book in his hands, so he is totally aware.

My only fear, and we have gone through this, and I guess Michael can attest to this, but the police department, a lot of times a Judge rules against us incorrectly because of the climate, you know, the climate, okay. But it is very clear [11] that if no one else was aware of the meeting, he was.

MR. STEPHENS: Well, definitely he admits – He admits that he was aware of the meeting. He alleges something that doesn't appear to be consequential, but

he said that he was kicked out, that he wasn't allowed to come back into the meeting, because he was kicked out of the CRA meeting, you know.

MS. WADE: Okay. Well, does – are you aware of the fact that these microphones and the cameras broadcast outside and downstairs?

MR. STEPHENS: No.

MS. WADE: Well, he still had an opportunity to see what was going on.

MR. STEPHENS: Well, he is complaining about it being closed, and they are attacking the notice in a variety of ways. I mean, they are saying about the time. They are also saying about, you know, they incorrectly stated in their complaint that it was only posted here, and that's not –

MS. WADE: And we can prove otherwise.

MR. STEPHENS: And that's not true, so they are talking about the manner in which it was posted or communicated to the public, and they are [12] talking about the amount of time.

Basically what they are doing is, you know, they are trying to allege everything they can and throw everything they can in here to say, this was a bad meeting, but the Sunshine violation can be two people meeting on their own about something that is going to come before the council, but it can also be the council having a meeting after having given insufficient or unreasonable notice, and that's what really what we are talking about is, whether or not the notice was sufficient.

And I think the fact that there is no case law that says that what you did is clearly wrong, to me that, you know, quite frankly, there should be a presumption that maybe he was right, because there is nothing that said that it was clearly wrong.

MS. WADE: Would it be too much work to go back and pull every, I would just say the last five or six special meetings that we've had to show just how much notice was given on those, because we have had quite a few meetings that was only 24 hour notice.

MS. RYAN:Right, and I think that if it comes to a hearing, it will be sufficient for The [13] Court to come in and say, we had a meeting on this date, 24 hours notice. We had a meeting on that date, 24 hours notice. This is what the city, you know, did. We have done this for years. We were in compliance with the law, as far as we knew.

MS. WADE: And then there is also a few years back where the Palm Beach Post took the city to court for a records violation, and the ruling of that Judge was, one day is fair, and one day equals 24 hours, so we have worked under the assumption of the 24 hour rule for, you know, quite some time.

MR. STEPHENS: Well, the Sunshine manual states that a special meeting has to be – you have to give at least 24 hour notice.

In this case more than actually 24 hour notice was given. I mean, they are saying 24 hour notice; but in essence, it was more than 24 hour notice, and I think the fact that it was posted on Channel 18 is important. I mean, I think that is really important, the fact that it was posted on there. Anybody who is concerned

about making it to a city council meeting, and they live within your city, could have gotten that notice.

MS. ILES: No. They are talking about the [14] May 10 meeting that we called a special city council meeting after the CRA meeting.

MS. RYAN:Try not to get confused, because I continue to do it. The special meeting that was called on the Bernard McKenzie contract, that was a meeting that was called Wednesday night at the council meeting for Friday morning at 10:00. There were two different meetings. I am constantly confusing this.

MS. WADE: What day was the May 10 meeting?

MS. RYAN:The May 10 meeting I believe was a Wednesday night after. The meeting was supposed to start – we put it on for 8:00 o'clock or after the CRA meeting, and the CRA meeting went a long time, and I remember we were, city staff, was waiting around and waiting around, and I think —

MS. WADE: I think she stopped the meeting and had that one and then went back to the CRA meeting.

MS. ILES: We stopped the meeting around 8:30, quarter to 9:00.

MS. WADE: We actually cut the meeting because of that advertisement.

MS. RYAN:My recollection is that the meeting didn't start until —

[15] MS. WADE: Well, we can clarify by looking at the tape.

MR. STEPHENS: The May 10 meeting?

MS. RYAN: Yes. Do you know what time?

MR. STEPHENS: The May meeting, it lasted – the CRA meeting lasted – it had to be about two hours and 45 minutes.

And the reason I say that is because the whole thing, I looked at, it was about two hours and 54 minutes, you know, so —

And this, the actual meeting didn't take very long, so I would say the meeting – so it was at least two-and-a-half hours, the CRA meeting. It was at least two-and-a-half hours.

MS. RYAN: I think it was closer to 10:00 o'clock.

MS. ILES: So then why did we call for the meeting to take place that Monday?

MS. RYAN: The mayor called for the meeting, and I don't know if —

MR. STEPHENS: It was posted at 3:40 on, I believe, May 9. I believe the posting as at 3:40.

MS. RYAN: P.m.

MS. ILES: Right.

[16] MR. STEPHENS: P.m., yeah, and the meeting actually —

So, I mean, you are talking about more than 24 hours.

MS. WADE: Okay. Now, madam chair, when the clerk faxed the notice to The Post, did The Post print it?

MR. STEPHENS: I haven't figured that out yet. I am going to call someone at The Post.

MS. WADE: Because if they got it at 3:45 p.m., then they had time to have it in the paper the next day, like they usually do.

MR. STEPHENS: Well, they definitely had time to have it in the paper, if the[y] wanted to do that. I mean, they could have posted it on their web site, if they wanted to.

MS. ILES: But are we responsible if they did not post?

MR. STEPHENS: No. What you have to do is – what you have to do is make an effort to give people notice; and, actually, the case law indicates that, you know, the press having notice is important, not just for noticing people that there is a meeting; but, also, it shows that you are not trying to have a meeting in private. [17]

MS. WADE: But do we pay for that posting?

MR. STEPHENS: Right.

MS. WADE: Okay. So when she cites that, we need to find out if we actually paid for that.

MS. RYAN: We don't pay for that, not for that.

MS. WADE: Not for special meeting?

MR. WILKINS: They have a section in the paper where they publish notices.

MS. RYAN: It is free. That part is free.

MS. WADE: That's what I wanted to know, if that part was free or if it was something out of the ordinary. What I am saying is, going back to the

history of the number of special meetings that have been called, it is different from when we are doing ordinances and all that kind of stuff.

MS. RYAN:Those have to be noticed.

MS. WADE: I just wanted to get that clear.

MS. ILES: I am trying to get some sense as to why we called the meeting on that Tuesday.

MS. RYAN:You didn't call the meeting. The mayor called the meeting.

MS. ILES: I understand. Why the mayor called the meeting. Why did the mayor on Tuesday call for the meeting?

[18] MR. BROWN: That's a question to me?

MS. ILES: Yes.

MR. BROWN: Okay. I was listening to the discussions. I believe, if I recall, we had adopted the contract, if I am getting the dates right. The city, and forgive me, I was kind of paying attention to what you all were saying. The city commission had accepted and agreed to retain Mr. McKenzie, I believe.

MS. RYAN: No, we are not talking about McKenzie.

MR. BROWN: Because here is what happened.

MS. RYAN: McKenzie was – that was at a council meeting, but this meeting happened before McKenzie.

MR. BROWN: Here is what happened. Here is what happened. You remember, I believe it is the time when we had the agreement with Viking.

MS. RYAN: Yes.

MR. BROWN: Right?

MS. RYAN: Yes.

MR. BROWN: And in order for the CRA to enter into a binding agreement, the city and the CRA have to meet on it.

MS. RYAN:Yes.

[19] MR. BROWN: And I believe what happened is, when I called the special meeting, it was we who approved the Viking written agreement at the city council meeting.

MS. RYAN:No, at the CRA meeting first because you called —

MR. BROWN: At the CRA meeting, and then this meeting followed that meeting?

MS. RYAN: Correct.

MR. BROWN: Because you needed, in order for a contract to be binding, because there was city property affected by the CRA agreement, we needed a city council meeting, so that this council could also approve the same contract.

MS. RYAN: Right. She wants to know why did you —

MS. ILES: I was just trying to get some sense of —

MR. BROWN: And the reason – I believe this is the meeting you are speaking of. The reason I did it is because if the CRA signs a contract, and the city hasn't signed a contract, particularly with all of their property and city property that was involved, then it is an incomplete process.

MS. RYAN:Right, and you want it done by May [20] 10.

MR. BROWN: We needed it. Right. In order for us, as a body, that's one of the things we agreed upon, all of us. In order for us to move forward, we needed both meetings.

MS. RYAN: Correct.

MR. BROWN: All right. If you would have had just the CRA meeting without the city council meeting, you would have had an incomplete process; and, therefore, not a legal subsequent agreement.

MS. RYAN: And so the issue, this is a question, was added on to the CRA meeting, or was it already listed on the CRA meeting?

MR. STEPHENS: It was an add on.

MS. RYAN:So it was added on to the CRA meeting, and so you called for a discussion meeting of the council, so it would be done on May 10.

MR. BROWN: Right, but remember, at the CRA meeting, obviously, we have had a series of discussions and negotiations regarding the CRA, the master developer dating forever, and when the council and the CRA enter into the agreement with Viking, yes, we had to have —

I called a special meeting so that that [21] contract that we entered, that you all entered at the CRA will be valid, because the city had to have a meeting to approve the same contract.

MR. STEPHENS: And I think, quite frankly, I think somebody was talking about sympathy earlier. I think if you can show to a Judge, and I think you have

to do it this way. I think if you can show to a Judge that way before anybody started complaining with the legislature and coming up with a bill and all this stuff, that the city invested a lot of time and a lot of money to make this happen and that other folks were the ones who went and started trying to do things behind the doors to shut this down.

And I think, really, I think if you can parade those people into the courtroom to say, I was working on this since this date, and so now, you know, now when you are trying to get all of this, you can't just rush and throw something. You are spending all this time, all this money, to get all this together, and then you got other folks working against you.

I mean; and, you know, the Florida [22] Constitution says that you cannot create a law that will affect just the City of Riviera Beach. So they spent some time trying to make sure that they got it where it affected only the City of Riviera Beach without hurting other folks. And so they were doing all these things to create this to hurt the City of Riviera Beach.

And I think you can show that, and I think when you show that, I really do believe that public sentiment will certainly change when they see that the city was doing all this stuff for months, if not years, talking about bringing people in and getting contracts and going about your business, and then all of a sudden you get some other folks who were supposedly political power house people getting involved and doing things to try to kill the process.

I think all of that is important, and I think all of that deals with whether or not the notice, itself, is reasonable. Everybody knew with any common sense

that you had to try to get something together before that bill was signed. I mean, we just have to be realistic.

MS. WADE: That's what I mean by the climate, Don. That's exactly what I mean by the climate.

[23] MS. DUMCOMB[E]: It shouldn't be our argument. I mean, it should be that we have the right to try to solidify a decision that we have made. I think when you start going into all that other stuff, it sort of changes what the real issue is.

We finally adopted one area with the CRA, and we just needed to solidify it, and we needed to get it over, because we had been working all this time with it.

MR. STEPHENS: Right. I don't think you can separate those issues.

MS. WADE: Wait a minute.

MR. STEPHENS: You can try, but I don't think you can separate what was the climate and all that stuff that was going on.

MS. WADE: The reason I am saying I am worried about the climate, you had a problem with the P and Z board with the same argument, and it made the most sense of all, but we did not get the vote, okay. So it is going to depend on – and the eminent domain issue is something that has been a global thing. People are complaining about they have no property, they are not vested, they are not affected, so it is going to – and so when we lay this out, one of the things —

[24] I know the reason I attended the meeting was that the governor was fixing to sign a bill that was brought up after we had started the process, okay, so I

didn't feel like I was shorting the governor or the legislature, because this was already in our toolbox. It was not put in the toolbox by the City of Riviera Beach, okay, and we had been working towards this for the last 15 years, not just a few years.

So, since we were this far in, and we have the invoices to show that there was ongoing work, and there was no reason in the world for us not to call a special meeting. We had called a special meeting before to get something finished.

MR. STEPHENS: Well, my point is that it wasn't that you all decided to try to rush this, just to rush to try to get something together. It was the fact that somebody was trying to do something to thwart the whole process.

MR. WILKINS:Mr. Stephens, the issue is not the motive for the meeting. The issue is whether the meeting was called in accordance with state law and regulations, and the facts are that we did, and it is irrespective of why we called the meeting.

[25] MR. STEPHENS: Right. Well, but what the law is, is that you have to look at the circumstances to determine whether or not it was reasonable.

You know, in other words, if you didn't have a deadline that was right there then —

MS. RYAN:Why call it.

MR. STEPHENS: — you should have called the meeting two weeks later or a month later and made sure that everybody got, you know, two, three weeks notice, so it is kind of hard to separate those things.

MR. WILKINS: Who makes the decisions whether it is three weeks long or a month long or a year long?

MR. STEPHENS: Yeah, but what I am saying is —

MS. DUNCOMBE: That's not the argument we need to make. Our argument is that we should make the argument that we had finally solidified one side of this contract, and we need to go on and solidify the other side of it.

MR. STEPHENS: Right.

MS. WADE: That doesn't make you rush it.

MS. ILES: But I think – go ahead.

MR. BROWN: I think it is also important to [26] point out, and it is important that we don't allow them to back us into this corner.

The fact is, is that when this council selected Viking as the master developer, there was a contractual obligation of some type with Viking, and the fact is, is that even though we had this meeting, and we reduced that contract, or we entered into one of a series of contracts that will eventually be executed with Viking, that was not the first contract we had with Viking. Because when this council selected Viking at that meeting, there is no one that can legally argue that the city and the CRA was contractually bound and that Viking was not bound and that Viking was not the master developer. So—

MR. STEPHENS: Right.

MR. BROWN: — when the governor and all these other people claim that we rushed to enter into a contract with Viking and that that contract only came

into place on May the 10, we can't let them lead us down to that track, because the facts are, no, we had a contract on the night when this council voted them, number one.

MR. STEPHENS: Right.

MR. BROWN: And if you don't believe that, if [27] this council had told Viking, we changed our mind, let's watch Viking walk in here with ten lawyers to sue us, or if a month later if Viking says, we are leaving, and this council and city would have said, well, no, if you leave, that's going to cost us money, we could have sued Viking, that's number one.

Number two, although I understand what you are saying as well regarding the practical [e]ffect of in court it helps that if you can show the Judge what the big picture was, because there seems to be some room in these, this area of the law that talks about, okay, let's look at why the meeting was held.

MS. RYAN: That's correct.

MR. BROWN: My second point is, and it is tied in to what you are discussing and what everyone else has mentioned here.

We need to paint the picture and look at it, if we haven't already, the connection between Mr. Lozman, the Pacific Foundation, the efforts from the governor and the legislatures and all of the local people here who are working together to try to stop a process that we have been working on since 1999.

[28] And I think that furthers your point when you say that we can paint the bigger picture, because the reality is that at this hearing, if we are able to pain that picture and point out how these people are

working together, I don't know if you have checked to see whether Lozman is tied to the Pacific Foundation, I don't know, but my suspicion is all of them are working together.

When you look at the Attorney General's office, apparently there are people from FDLE walking around. The governor said he was going to refer this issue to the Attorney General's office to see if we violated the Sunshine.

You know, if the governor or the Attorney General calls the FDLE office and says, I want you to look into Riviera Beach, so now they get FDLE people walking around, and these same people, Lozman and the rest of them, Ward, are walking around saying well, you know, FDLE is looking into Riviera Beach. It is all a part of the same scheme.

So we need to take – you need to figure out, one, how far we need to go to determine what the connection is, if any, between these groups. Are they working together? Who is funding them? Who [29] is funding Lozman? If there is a single source. That's number one.

And two, find out if they have met with people from the A.G.'s office, or the governor's office, or the rest of them, and are they all working together, and if that's the case, let's expose it soon, so that the public really understands what they are trying to do.

MR. STEPHENS: Right. And I agree. I think one of the things you have to do, and that's why I am saying, you really can't separate certain things. I think that The Court has to see the picture.

I mean, I just believe The Court has to see the whole picture, because I think if anybody looked at the whole picture, they would have to conclude that this is unfair to the City of Riviera Beach, what is going on. That's just what —

MS. WADE: Do we know if Lozman is a registered voter anywhere?

MR. STEPHENS: No.

MS. WADE: Because his front yard is water. He lives at the marina.

MR. STEPHENS: All we have done so far, and I [30] think that's why we are here, to see exactly what the council wants done. But all we have done so far is file a motion hoping to get rid of certain claims but realizing the issue of the notice claim is not going to go away on a motion, at least certainly not on a motion to dismiss, but hopefully some of the other issues will go away.

MS. WADE: Can we find out where he is registered? I don't think it is here.

MR. STEPHENS: I think we can send him some discovery to find out, ask him all sorts of questions and try to get other information.

MS. ILES: But how much difference would that make? Does he have to be a resident before he can file a lawsuit against us?

MR. STEPHENS: Well, I think he should have an interest. Obviously, he rents from the city.

MS. DUNCOMBE: He rents from the city?

MR. STEPHENS: I think he has enough interest in this lawsuit to get past on that issue, because he – I mean, he is – he rents. He has a contract with the city, I assume.

MS. WADE: I understand he has a contract with the city, but my point is, like Mike was talking about the ex pose.

[31] He has caused trouble before, okay, and is he a pawn that's just being moved around? Is he a registered voter? Okay. He is definitely not a property owner, because he is renting and living on the water. His front yard is water, his backyard is water, and his side is water.

Okay. He lists his address as 200 Blue Heron, I mean, 13 Street, but that's my address. That's the marina's address, you know.

So, and then, as Michael asked, who funded it, and I think it is a big game to Mr. Lozman, okay, because of the things that he rallied up in – where was it?

MR. BROWN: South somewhere.

MS. WADE: South Miami or somewhere, and it is a big game to him, but is he – you know, what are his motives? Is there any way we can kind of point at some of the motives?

MR. STEPHENS: I think before you do that you got to find out what is going on.

MR. BROWN: Well, then that's really the question to me, for us is, do we want, and I suggest to the council, direct you or to spend some money to do some background investigation on Lozman, his connection, and the connectivity of [32] all of these

groups together. Not, I mean, not a whole treasury of the city but from –

And, look, not a big brother from the standpoint, oh, we want to investigate who these people are.

MR. STEPHENS: I think a private investigator can find those things that you are talking about.

MR. BROWN: Let's find out who they are. Let's find out if, because I suspect they are working together. Find out if he is a pawn. Somebody is funding him.

MS. RYAN: But my question is, how is that, and that's fine, but how is that relevant to the lawsuit?

MR. BROWN: It is very relevant.

MS. RYAN: Hold on. Even though the Judge looks at the circumstances, they are still looking at the four corners of this complaint.

This is not a frivolous lawsuit. I don't think it is frivolous. I think we can win, but an argument can be made, and they made the argument that the meeting should have had at least, should have had more than 24 hours notice because of the type of meeting that it was.

MR. BROWN: What about if you were the Judge [33] and you are sitting there and they walk —

MS. RYAN: I would not bring in that testimony.

MR. BROWN: Well, let me finish my point. If you were the Judge and you were sitting there, and I guess you answered it. If I was able to explain to you well, wait a minute, Judge, let me tell you what is really happening here.

First of all, we have had these type of meetings. This is the standard proceeding. We have had emergency meetings before. There is nothing out of the ordinary about our process here, and here is what is at work, and here is the context in which the meeting was held.

Now, even if the Judge doesn't let it in, the fact that we find it out, at least it helps us in preparation.

MS. RYAN: Sure.

MR. BROWN: For this lawsuit.

MS. RYAN: And for the next one.

MR. BROWN: And other lawsuits, because these —

We need – what my reason – I really wanted to be here today is so this council understands, at least in my opinion, we need to understand that [34] these people are attacking us. They are trying to destroy everything we have worked on.

And, even though this is just the first step in this lawsuit, there are some very powerful people from the government down to the legislature, and they all think the same thing, whatever his name is, who basically are here to try to destroy us, and we need to understand that. We need to use every reasonable tool that we have to find out who they are, what we are up against, so that we can map our strategy out or else we will be pushed out to Okeechobee, Clewiston, and beyond.

MR. STEPHENS: Right, and I think, basically, I mean, I think both of you are right, actually. I mean, I think that you have to have information so that you

know who you are dealing with, even if you don't use it in court, but Ms. Ryan is right.

In Court what really is important is what you all were thinking when you set the meeting on their date at that time.

I mean, that's what The Court is going to look at to make a determination of what is reasonable, what is reasonable from your perspective, and I think what is reasonable from your perspective was the fact that you had been [35]going through all these contracts, and you had been doing all these things, and there was no way that you weren't going to work your butt off to the last minute to finalize this last piece of the puzzle to get it done.

And I think you all are right, and so I think both of you are right, but if you are dealing with somebody in a lawsuit, I mean, you know, we have normal lawsuits. We want to find out everything we can about the person who is suing our client. We want to know everything about it. I mean, we know whether they are in debt and all that kind of other stuff.

MS. WADE: I think it would help to intimidate the same way as FDLE is coming to my house. I am wondering if my lines are tapped or whatever. I think they should be questioned by some of our people on a legitimate pay scale basis so that they can feel the same kind of unwarranted heat that we are feeling, and I am going to caution that the city has been there before; and, as I said, it is not right now who is right. It is the climate.

We watched an entire council over a two year period being oust, black and white. We watched an [36]

entire administrative staff being taken out, black and white. We watched Newman, the FBI agent that was sent here for two years after the last election was over, stand and say that they, after the election, they found no corruption in the City of Riviera Beach.

So, I am saying, it is the climate. We can go in there and be as right as right can be, but if that Judge is already preconcluded, you got the governor's hand in this, or supposedly in this, because all we have got is hearsay that his hand is in it. You understand what I am saying? You got FDLE knocking at my door.

MR. BROWN: He called my name, buddy. The governor called my name.

MS. WADE: He called your name? What I am saying, I am very, very – I am not scared, but I am very cautious. I have seen this city right, dead right.

Okay. And as a result of that, the city – now, if we lose this process that we have got over here, we can look back and see what the city lost in that process when they took out that council and the city manager and staff, okay.

Ibis, Caloosa and Iron House, they were all [37] in the annexation map with the City of Riviera Beach. Okay. We have none of it. Okay. As we speak today, we have none.

If these people are successful, then we are going to have the same right or worse on our eastern shores. So, it is very important that we understand the history, and that's why I say it is very important that you form or we formalize some kind of strategy that's going to let the Judge know that it is not the first time, okay.

And the city ends up losing when you get people like Tina White that's only interested in getting her a job. She wants to pick up trash. She doesn't have a pickup truck. She wants to do hurricane roofs. She doesn't have a hammer to nail. You understand? She wants to do the Jazz Festival. She can't sing an [sic] tune, but she has come to this city and ask for all of these things. I am sounding funny, but she is one person. Okay. Now she is on the war path.

We have a guy that works for Waste Management. He is now sending us what was wrong with Waste Management's contract.

If they all prevail on incorrect information because of the climate, the city loses, and when [38] we are talking about identifying the people who is behind it, I am trying to give you as much information I have in an open forum that we can start checking on.

MR. BROWN: Ms. Wade, I agree with most —

MS. WADE: I know it is hard for you to say, Michael.

MR. BROWN: What I wouldn't – I don't know the specifics of the individuals that she is – I mean, I know who the people are, and Ms. Wade expresses her way in a certain way, and I have mine, but do agree with her, and we are 100 percent on the same – this is serious stuff, and what – this is the first step, and I agree, these people are trying to destroy everything that we have done. And when Ms. Wade talks about Iron Horse and Caloosa, most people don't understand what you are talking about, Ms. Wade, in that those areas out west that were in the annexation area of Riviera Beach, that all of these forces that have

worked together over the years and circumstances that happened here in City Hall came together and deprived this city of those very valuable assets.

And, if we don't understand, we must [39] understand in this bound, that this fight goes on, and this is the Alamo, as far as I am concerned, and this is serious stuff.

MR. STEPHENS: And that's what I am talking about when I say the big picture, and that's why I say, you can't try to fight a narrow, legal issue. If you do, you are going to lose.

MS. WADE: That's right.

MR. STEPHENS: I mean, that's all I am saying to you, and you can say well, I don't want to bring this in here, but it is all in here.

I mean, you got to put it together, and you got to put it together, and you got to paint it broad so that they will know what you all were thinking.

MS. ILES: And as we are all – we are here to hear the statement in our community. We got to call a spade a spade, and we can sit here, and it is going to be uncomfortable, but the facts are the facts, and we need to put them out there, and it wasn't the folks sitting on the stairs that lost that property out there. It wasn't the folks outside. It was the folks sitting on this dais that lost us Caloosa, Iron Horse, and all of those things out there.

[40] I don't have anything to say about the governor. The governor will do what he feels like he needs to do. But, the bottom line for me is that this community needs to move forward, and irrespective of what anybody in Tallahassee does, and I will use my

analogy here, and it probably will make some people uncomfortable, but so be it.

You can't tie my hands, put a noose around my neck, put me on a box and then wait for me to sit there and wait for me to kick that box out from under me, okay.

I got to try to figure out how to get that noose out from around my neck, and it is about self preservation. It is about moving the city forward. We have home rules. We have to make the decision, and they are not going to be popular, because people don't want to change, you know, or people are afraid of change, suspicious of change, and once it occurs, and it is a good product, then folks, you know, yes, I was with them, but yeah, but she was up beating us up.

But we need to have all of the things that could possibly be coming at us, all of those avenues, no matter how they are labeled, you know.

MS. DUNCOMBE: Madam chair, may I offer a [41] consensus; and, like you say, the council previously helped cause a lot of the problems of that era. It is perceived now that we are in disagreement, okay. Let us take this opportunity to send one message. Whatever goes on in our home is in our home, but when we step out the door, we have to step out together.

Let me offer this consensus, that we put as much money behind this case as we have to. We have spent money on other things that we have disagreed together on and selected, but we need to make one solid statement. Whatever our disagreements are, we are

not going to allow you to take our disagreements with each other and beat us up with it. Okay.

So, I would like to offer up a consensus that we spend whatever. If you need a private investigator, whatever you need. If you need somebody to shadow every name that's on this document, I ask for a consensus that we spend those dollars and get it done, so we send one message. This is our house, and we are going to stay, and there ain't none of them going to run us away.

MR. STEPHENS: And this is – this is just a [42] small part of the fight, you all are right, that they are trying to attack you on both sides with two different things, but really they are trying to fight the same thing; and that is, they are trying to stop this development, and that's the bottom line.

They are saying Sunshine violation, but this has absolutely nothing to do with that. What it really has to do with is they are saying this is one mechanism to try to void the contract to make the other bill binding on you.

MS. ILES: Okay. Let's try to get this one to some kind of end, because we have got a second one we need to —

MS. RYAN: Which should be brief, because of this one, the discussion.

MS. ILES: Do we have a consensus of what Ms. Wade is saying? I guess it is not on so —

MR. JACKSON: I think what Ms. Wade says is right. We do have to beat this thing, and whatever it takes, I think we should do it.

MS. RYAN: Okay.

MS. DUMCOMBE: Okay. The only thing I have to say is that the only way you can have a consensus and really show that you have it, [43] council can't be in court fighting on enough. We need to settle that situation and get it out of the way. I don't care what you feel. That's the only way you can show that we have a – and, listen, one thing you don't ever have to worry about me in terms of whatever happens in terms of what decisions we make. I am not going to ever go out there and knock anybody.

I am from a family of 13, and we never agreed. We didn't deal with sister-in-laws, brother's in-laws, nieces and nephews. Whatever we said, that was it, and we had lot of disagreement, and that was reasonable. So I, you know, that's the only thing I have to say. You are going to have to settle with what you have going on with yourself. You have got to settle that.

MS. WADE: When you say what we have going with ourselves, are you referring to the case with the mayor?

MS. DUNCOMBE: Yes.

MS. WADE: I am not going to discuss that matter. May I finish my statement? I am not mad, but what I am saying though, my recommendation, Ms. Duncombe, is that the City Attorney talk to [44] you and give you the real info on that case, so that you will have a real complete understanding from the real legal point of it.

I am not going to discuss it here or debate it with you, but – and I agree with what you are saying. Looking at it from the outside looking in, it looks bad.

So now that you are on the inside, I would highly advise you to please talk to the city attorney. The case has ended, unless the mayor thinks it is not. There is a decision on the case. So you need to talk to the city attorney so that you will have a better understanding.

MR. STEPHENS: So we won't have a Sunshine violation while we are here, I think you will have to be careful.

MS. RYAN: Don't say anything else, please.

MS. ILES: Okay.

MR. STEPHENS: It is part of the strategy, I understand.

MS. ILES: We have a consensus to move forward on this particular lawsuit and to do whatever we deem necessary, that means collecting information about what is going on so we can be better prepared.

[44] MR. STEPHENS: Absolutely.

MS. ILES: And then to try to formulate our strategies.

MR. STEPHENS: Right.

MS. ILES: Even if we have to go to court, if it is not dismissed. Okay.

* * *

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-10550

District Court Docket No.
9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff - Appellant,

versus

CITY OF RIVIERA BEACH, a Florida municipal corporation,

Defendant - Appellee,

MICHAEL BROWN, an individual, et al.,

Defendants.

Appeal from the United States District Court for the Southern District of Florida

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JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: February 28, 2017
For the Court: DAVID J. SMITH, Clerk of Court
By: Djuanna Clark

Florida Statute Annotated § 871.01

Disturbing schools and religious and other assemblies

Effective: June 20, 2006

(1) Whoever willfully interrupts or disturbs any school or any assembly of people met for the worship of God or for any lawful purpose commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(2) Whoever willfully interrupts or disturbs any assembly of people met for the purpose of acknowledging the death of an individual with a military funeral honors detail pursuant to 10 U.S.C. s. 1491 commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

When a plaintiff claims that the government retaliated against his First Amendment-protected expression by arresting him, does the existence of probable cause for the arrest operate as an absolute bar to his claim?

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United States v. Miller, 146 F.3d 274 (5th Cir. 1998) 30

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Other Authorities

Activist Arrested at Riviera Beach City Council Meeting, YouTube (Sept. 15, 2009)..... 6

Brandeis, Louis D., Other People's Money and How the Bankers Use It (1914) 18

City of Riviera Beach, RBTV (city website) 6, 25

City of Riviera Beach, Regular City Council Meeting Minutes (Nov. 15, 2006) 6, 7, 44

City of Riviera Beach, Your Elected Officials (city website) 3

Cooper, William, *Fears Fail to Ease Over Loss of Land*, Palm Beach Post (Nov. 17, 2006) 5

F.B.I., National Incident-Based Reporting System User-Manual 35

Fields, Gary & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, Wall St. J. (Aug. 18, 2014) 24

Jackson, Robert H., The Federal Prosecutor (1940) 22

Jain, Elisha, *Arrests as Regulation*, 67 Stan. L. Rev. 809 (2015) 24

Kalven, Harry, Jr., The Negro and the First Amendment (1965) 31

Kennedy, Randall, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999 (1989) 31

LaFave, Wayne R., Search and Seizure (5th ed. 2012) 23

Madison, James, Report of 1800, *in* 4 Elliot's Debates on the Federal Constitution (1863) 18

Osborne, John Jay, Jr., The Paper Chase (40th anniversary ed. 2011) 48

Simon, Robert I., *The Psychological and Legal Aftermath of False Arrest and Imprisonment*, 21 Bull. Am. Acad. Psychiatry & L. 523 (1993) 24

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BRIEF FOR PETITIONER

Petitioner Fane Lozman respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, Pet. App. 1a, is unreported but is available at 2017 WL 765771. The order of the United States District Court for the Southern District of Florida denying respondent's motion for summary judgment, Pet. App. 15a, is reported at 39 F. Supp. 3d 1392.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 28, 2017. Pet. App. 1a. On May 15, 2017, Justice Thomas extended the time to file the petition for a writ of certiorari to and including June 28, 2017. *See* No. 16A1100. Petitioner filed his petition that day, and this Court granted it on November 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

This case arises from a dispute over municipal policy between petitioner and the City of Riviera Beach that culminated in petitioner's arrest in November 2006. Petitioner claims that the arrest was the product of the City's hostility toward his First Amendment-protected activity. Pet. App. 5a. The Eleventh Circuit acknowledged that at trial petitioner had "established a sufficient causal nexus" between his arrest and retaliatory animus on the part of the City Council. *Id.* 10a. Nonetheless, it held that petitioner could not recover because the jury's finding that a police officer had probable cause to arrest him for disturbing a lawful assembly—a crime with which he was never charged—created an "'absolute bar'" to his First Amendment retaliation claim, *id.* 7a.

1. *Factual background.* In early 2006, petitioner, a former United States Marine Corps officer and a financial trader, moved to the City with his floating home and leased a slip in the municipally-owned marina. Pet. App. 16a. Shortly thereafter, petitioner learned that the City planned to redevelop its waterfront area. Among other things, the City planned to

seize "thousands of homes through the power of eminent domain" and transfer property "to a private developer." *Id.*

Petitioner became an outspoken critic of the plan. As the City was finalizing its agreement with the developers, the Florida Legislature passed a bill prohibiting the use of eminent domain for private development. Pet. App. 2a. But the day before the Governor was scheduled to sign that bill into law, the Riviera Beach City Council convened an "eleventh-hour" meeting to approve the agreement. *Id.* 3a.[1]

In response, petitioner filed a lawsuit alleging that the agreement was invalid because the City had violated Florida's "Government in the Sunshine Law," Fla. Stat. ch. 286. One of that law's requirements is that governments within the state provide reasonable public notice before holding a meeting at which official action will be taken. Fla. Stat. § 286.011; *see* Pet. App. 2a-3a.

After petitioner filed his lawsuit, members of the City Council came under investigation by the Florida Department of Law Enforcement. Pet. App. 3a. Members of the Council perceived a connection

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[1] According to the City's official website, "Riviera Beach has a Mayor-Council-Manager form of government, in which the City Council appoints the City Manager as the chief executive officer to manage the day-to-day operations of the city." The Manager reports directly to the Council (not to the Mayor) and the members of the Council "also sit as the Board of the Community Redevelopment Agency." City of Riviera Beach, Your Elected Officials, https://tinyurl.com/1721RBGOV (last visited Dec. 19, 2017).

between petitioner's lawsuit and the investigation. *See* J.A. 171, 175.

On June 28, 2006, the City Council held a closed-door meeting to discuss petitioner's lawsuit.[2] Councilmembers expressed their anger at petitioner. Councilmember Elizabeth Wade proposed that the City "intimidate" him and make him "feel the same kind of unwarranted heat that we are feeling." J.A. 176. After further discussion, a second councilmember asked whether "we have a consensus of what Ms. Wade is saying"—namely, to send petitioner a "message." *Id.* 181 (Councilmember Iles). A third councilmember agreed that "what Ms. Wade says is right. We do have to beat this thing, and whatever it takes, I think we should do it." *Id.* (Councilmember Jackson). A fourth councilmember and the City Attorney each replied "Okay." *Id.* at 182 (Councilmember Duncombe and City Attorney Ryan). *See* Pet. App. 18a.

The City soon took a series of actions against petitioner. One example already familiar to this Court involved efforts to evict him from the municipal marina, where petitioner was living on his floating home. *See Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013). The City first brought eviction proceedings against petitioner in state court. But a jury returned a verdict in his favor. The jury found "that Lozman's protected speech was a substantial or motivating factor in the City's decision to terminate his lease." *Lozman v.*

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[2] Florida's Sunshine Law allows city councils to hold closed-door meetings to discuss pending litigation. Fla. Stat. § 286.011(8). These meetings, however, must be transcribed and the transcripts made public once the litigation concludes. *Id.* § 286.011(8)(c), (e).

City of Riviera Beach, 713 F.3d 1066, 1070 (11th Cir. 2013).

Undeterred by these "unsuccessful efforts," *Lozman*, 568 U.S. at 118, the City turned to federal admiralty law to evict petitioner. Invoking that law's special rules allowing *in rem* actions against vessels, the City seized, and ultimately destroyed, petitioner's floating home. *Id.* at 120. But this Court held that the seizure was improper because petitioner's floating home was not a "vessel." *Id.* at 118.

2. *Petitioner's arrest.* This case springs from yet another action the City took against petitioner. The City Council met in regular public session on November 15, 2006. Immediately before the meeting, the City had finally abandoned its plans to redevelop the waterfront. *See* William Cooper, *Fears Fail to Ease Over Loss of Land*, Palm Beach Post (Nov. 17, 2006).[3]

The meeting, as usual, included a non-agenda public comment period. During that portion of a meeting, there are no subject-matter limitations on a speaker. J.A. 123. As one city councilmember explained, "when you come to the microphone and you're speaking, you have your three minutes to really express yourself on how you feel about what's going on with reference to the City, community, just whatever is going on at that time." *Id.* (testimony of Councilmember Davis). A speaker can talk about county issues. *Id.* Indeed, he can "read a nursery

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[3] Available at https://tinyurl.com/1721PBP (last visited Dec. 21, 2017). Shortly thereafter, petitioner dismissed his Sunshine Law case.

rhyme for three minutes as long as [he does] not use profanity." *Id.* 124.[4]

The events that followed were, as the court of appeals noted, captured on video. Pet. App. 3a. For a currently available version of the video, see *Activist Arrested at Riviera Beach City Council Meeting*, YouTube (Sept. 15, 2009), https://tinyurl.com/lbj5qqj (at 0:30).[5]

At his allotted time, petitioner approached the lectern and began to speak about public corruption in Palm Beach County, where Riviera Beach is located. After a few seconds, Councilmember Wade, who was presiding at the time, *see* J.A. 115, attempted to cut him off, Pet. App. 4a. When petitioner continued his remarks, she summoned Riviera Beach Police Officer Francisco Aguirre, who was on duty at the meeting. Petitioner told Officer Aguirre that he was not finished speaking. Councilmember Wade then ordered the officer to "carry him out." *Id.* At that point petitioner was arrested, handcuffed, and removed from the meeting. *Id.* The City Council's official minutes described the event this way: "Fane Lozman, City Marina, was escorted out to [sic] the meeting at the request of Councilperson Wade." City of Riviera Beach, Regular

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[4] The official city council minutes refer to the time limit for non-agenda public comments as being two minutes, *see, e.g.*, City of Riviera Beach, Regular City Council Meeting Minutes at 3 (Nov. 15, 2006), https://tinyurl.com/RBMin1115, but that time difference is immaterial to this case.

[5] Per City Council policy, all meetings are broadcast live and posted on the City of Riviera Beach's website for later viewing. City of Riviera Beach, RBTV, https://tinyurl.com/1721RBTV (last visited Dec. 20, 2017).

City Council Meeting Minutes at 4 (Nov. 15, 2006), https://tinyurl.com/RBMin1115.

Petitioner was taken to the police station and placed in a holding cell. When he was released, he was given a notice to appear. Ultimately, that notice contained two charges: "disorderly conduct," *see* Fla. Stat. § 877.03, and "resisting arrest without violence," *see id.* § 843.02; Pet. App. 4a.

The state's attorney, however, soon dismissed both charges on the basis that there was "no reasonable likelihood of successful prosecution." Pet. App. 4a-5a (quoting Pl. Ex. 12).

3. *District court proceedings.* Petitioner filed this Section 1983 lawsuit in the U.S. District Court for the Southern District of Florida. As is relevant here, he alleged that the City violated the First Amendment's Petition and Free Speech Clauses by directing his arrest in retaliation for his Sunshine Law suit and his public criticism of city officials and policies. Pet. App. 29a; J.A. 31.[6]

To prevail on his First Amendment retaliation claim, petitioner was required to prove three elements common to all such claims. First, petitioner had to show that he had engaged in protected First Amendment expression. Second, he had to show that the action he was challenging—here, his arrest—is the kind of action that would chill a person of ordinary firmness from exercising First Amendment rights.

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[6] Petitioner brought several other claims under the First, Fourth, and Fourteenth Amendments, as well as under state law. Pet. App. 22a-23a; J.A. 32, 38-41. Those claims, which have been finally resolved, are not at issue here.

Third, he had to show that animus against his protected expression motivated the City's action. *See Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005).

But because petitioner was challenging retaliation that took the form of *an arrest*, Eleventh Circuit precedent required that he prove a fourth element as well—that there was no probable cause for that arrest. *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002).

The district court held before trial that petitioner satisfied the first two elements. First, "the record plainly show[ed]" that he "was engaged in expressive political speech, as well as the valid exercise of his right to petition the government." Pet. App. 32a. And there was no dispute that the prospect of an arrest could deter a person of ordinary firmness from exercising his First Amendment rights.

But the district court determined that a trial was necessary to resolve the third and fourth elements of petitioner's claim. The court saw "sufficient circumstantial evidence" in the record to make the existence of an "unlawful motivation behind the City's actions" a "jury question." Pet. App. 32a. That evidence would permit the jury to find that a majority of the City Council "harbored illicit motivation to punish and deter Lozman based on his exercise of free speech and petition of government." *Id.* 31a. It was also a jury

question whether the alleged retaliatory actions were "taken with [their] support." *Id.* 32a.[7]

With respect to the final element, the court likewise identified "a genuine issue of material fact on the question of whether City of Riviera Beach police officers had probable cause to arrest Plaintiff for disorderly conduct or resisting arrest without violence." Pet. App. 30a.

The trial in this case lasted nineteen days, with petitioner proceeding *pro se*. Along with other evidence, petitioner introduced the videotape of the public City Council meeting at which he was arrested. He also introduced the transcript of the closed-door meeting called to address his Sunshine Law case, at which councilmembers had expressed their animosity toward petitioner and their consensus to respond forcefully. J.A. 175, 180-81.

Beginning on the eighth day of trial, the district court held lengthy, repeated discussions with the parties regarding the question whether there was probable cause for petitioner's arrest. The starting point was the two offenses that had been listed on the notice to appear petitioner had received after his arrest. The court pointed out that there was no dispute over

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[7] Section 1983 provides a remedy when a city government "causes" a person "to be subjected" to a deprivation of a constitutional right. Under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a city may be held liable under Section 1983 for acts taken "pursuant to official municipal policy of some nature." *Id.* at 691. This Court has held it "plain that municipal liability may be imposed for a single decision by municipal policymakers." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

"exactly what happened on November 15th of 2006 because we have a video clip, with both sight and sound." J.A. 105. Taking that evidence "in the light most favorable to the City" with respect to those offenses, the court found a lack of probable cause as a matter of law. *Id.* 105, 108. There was "nothing there that would establish the crime of disorderly conduct." *Id.* 105. Nor, despite the City attorney's "interesting" and "intriguing" arguments, *id.*, did the crime of "resisting or obstructing a police officer appl[y] to what happened here," *id.* 108.

But the district court did not find the absence of probable cause as to the offenses listed on the notice to appear to be dispositive of whether petitioner had established the fourth element of his retaliation claim. Instead, consistent with *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)—which holds that the Fourth Amendment's "probable-cause inquiry" is not "confined" to "the offense actually invoked at the time of arrest"—the court declared that "the real issue" was whether Officer Aguirre had "probable cause to arrest [petitioner] for *anything*." J.A. 100 (emphasis added). Accordingly, it asked the City "[w]hat else" it might have—that is, whether there were other laws for which there might have been probable cause to arrest petitioner. *Id.* 105.

The City identified two new candidates. The first was "trespass after warning." J.A. 86; *see* Fla. Stat. § 810.08(1) ("Whoever, . . . having been authorized, licensed, or invited [into any structure], is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so, commits the offense of trespass in a structure or conveyance."). The putative theory here

was that "the Chair of the City Council certainly has a right to withdraw [an] invitation" to the lectern "if the Chair concludes that the speaker is not abiding by the rules." J.A. 110.

The second option the City proffered was Florida Statutes Section 871.01(1), J.A. 95. That statute provides that "[w]hoever willfully interrupts or disturbs any school or any assembly of people met for the worship of God or for any lawful purpose commits a misdemeanor of the second degree." Fla. Stat. § 871.01(1).

The court wrestled for several days with whether either of these statutes could support petitioner's arrest. On the tenth day of trial, it expressed some doubt that the disturbance statute could apply. In order "to meet constitutional standards," behavior that qualified as disturbance of an assembly had to be "somewhat akin" to the behavior covered by the disorderly conduct statute. J.A. 108. And the court had already held as a matter of law that the evidence did not support probable cause for disorderly conduct. *Id.* 105.

The court therefore suggested that the trespass after warning statute was the only one that potentially "applie[d]" to petitioner. J.A. 108. The court recognized difficulties with applying that statute to petitioner's conduct. But it explained that "it bothers me" that once Councilmember Wade had directed petitioner to stop talking, "we could leave that policeman and say there's not really a law that he's capable of enforcing." *Id.* 113. According to the district court, "there must be some law in the Florida statutes that covers this kind of situation." *Id.*

On the thirteenth day of trial, the court backtracked. Although it had earlier given the City's attorney an "A for effort" with respect to the argument for applying the trespass statute, J.A. 89, the district court announced that now it was "really thinking that the crime that we ought to focus on is the disturbing the public meeting." *Id.* 120. "[I]f we had to pick a statute, that really is the statute that I think is at play here." *Id.* The next day, the court announced itself "well-satisfied that if there's any crime, it's the disturbance crime." *Id.* 121. Ultimately, Section 871.01(1) was the only offense as to which the jury was asked to assess probable cause with respect to petitioner's arrest. J.A. 133-34.

At the close of evidence, the district court instructed the jury that, as a matter of law, petitioner's litigation under the Sunshine Law and his public criticism of the City in the months leading up to his arrest were protected First Amendment activity. J.A. 127. With respect to the question of retaliatory animus, petitioner had requested an instruction that the jury consider the city councilmembers' state of mind. But over petitioner's objection, the district court instead instructed the jury to consider only whether *Officer Aguirre* had "impermissible animus" against petitioner. *Id.* 132.

Finally, in keeping with Eleventh Circuit law, the district court also instructed the jury that petitioner had to prove that there was no probable cause to arrest him for disturbing a lawful assembly. J.A. 133-34 (requiring proof that there was "a lack of probable cause" for the arrest). Under the court's instructions, any animus by the City would become relevant if and only if the jury found that Aguirre himself acted with

retaliatory animus in arresting petitioner without probable cause. *See id.* 136-39.

The jury found probable cause for petitioner's arrest, Pet. App. 7a, and returned a verdict for the City. Based on the jury's verdict, the court entered judgment for respondent.

4. *Eleventh Circuit appeal.* On appeal, petitioner argued, among other things, that the jury instruction had erroneously directed the jury's attention to Officer Aguirre's intent rather than the city councilmembers'. The court stated that petitioner's argument was "compelling, as he seems to have established a sufficient causal nexus between Councilperson Wade and the alleged constitutional injury of his arrest." Pet. App. 10a. Even though Officer Aguirre had made the actual arrest, the court pointed out that Section 1983 imposes liability "for conduct which 'subjects, *or causes to be subjected*' the complainant to a deprivation of a right secured by the Constitution and laws." Pet. App. 10a (quoting *Rizzo* v. *Goode*, 423 U.S. 362, 370-71 (1976), and 42 U.S.C. § 1983) (emphasis added by the court of appeals)).

But the Eleventh Circuit concluded that any error with regard to the jury instruction was immaterial in light of the Eleventh Circuit's "absolute bar" rule. Pet. App. 7a (quoting *Rankin* v. *Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998)). The fact that "the arrest was supported by probable cause defeat[ed] Lozman's First Amendment retaliatory arrest claim as a matter of law." *Id.* 11a (citing *Dahl*, 312 F.3d at 1236).

With respect to the existence of probable cause in this case, the court of appeals held that "the video footage of Lozman's conduct at the City Council meeting"

permitted the jury to find that "Officer Aguirre reasonably believed Lozman was committing, or was about to commit, the offense of Disturbing a Lawful Assembly." Pet. App. 9a. As the Eleventh Circuit put it, the video showed that petitioner had "interrupted and refused to listen to Councilperson Wade when she tried to admonish him." *Id.* It also showed that petitioner declined to leave the lectern when asked to do so by Officer Aguirre. Accordingly, the court of appeals concluded "Officer Aguirre could have reasonably believed" that petitioner was violating Section 871.01(1)—"or was about to." Pet. App. 9a.

SUMMARY OF ARGUMENT

The First Amendment's guarantees of freedom of speech and the right to petition for redress of grievances would mean little if governments and government officials were free to retaliate against individuals who exercise those rights. The Eleventh Circuit's decision in this case, however, provides a license to use the arrest power to carry out such retaliation.

The Eleventh Circuit's rule that probable cause "constitutes an absolute bar" to any First Amendment retaliation claim involving an arrest, Pet. App. 7a, both erodes First Amendment protection in an area where such protection is especially needed and is irreconcilable with the most closely related constitutional precedents. The arrest power is a readily available and highly effective means of deterring protected expression. This Court repeatedly has recognized that government actions can implicate—and violate—more than one right. This Court has already held that the Equal Protection Clause imposes an independent limitation on arrests: Probable cause that satisfies the Fourth Amendment

does not bar a claim that an arrest was racially discriminatory. It should likewise hold that the fact that an arrest comports with the Fourth Amendment does not immunize it from scrutiny under the First.

This Court has a "well-established framework" for analyzing retaliation claims involving First Amendment-protected expression. *Texas v. Lesage*, 528 U.S. 18, 20 (1999) (per curiam). In the forty years since the framework was articulated in *Mount. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), it has been applied to First Amendment retaliation claims across a broad range of contexts—from the firing of government employees to the termination of government contracts, and from removing books in school libraries to disciplining prisoners.

Under this standard framework, a plaintiff alleging retaliation must show that he engaged in First Amendment-protected expression, that the defendant harbored retaliatory animus against that expression, and that the animus was a substantial factor in the government decision he is challenging. If a plaintiff meets this burden—and it is a substantial one indeed—the government defendant can still defeat liability by showing that the challenged decision would have been the same even absent the retaliatory animus.

This well-established framework should govern First Amendment claims when a plaintiff alleges that retaliation took the form of an arrest. The framework properly balances core First Amendment rights and legitimate government decisionmaking. In particular, the framework is well equipped to handle evidence regarding whether there was probable cause for the

challenged arrest. In some cases, probable cause will be close to dispositive on the question whether there was retaliatory animus or causation. But in other cases the existence of probable cause may have little evidentiary value. The facts of petitioner's case and of *Reichle v. Howards*, 566 U.S. 658 (2012), show why the Eleventh Circuit's absolute bar rule is both unnecessary and pernicious.

The Eleventh Circuit's rule finds no support in this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006). There, the Court created an exception to the *Mt. Healthy* framework for lawsuits in which the alleged form of retaliation involves a criminal prosecution. But the analysis in *Hartman* rests entirely on the fact that prosecutors themselves are absolutely immune from suit. That immunity, and a special "presumption of regularity" for prosecutorial decisionmaking, is the source of the causal complexity that led this Court to require that "want of probable cause must be alleged and proven" in a retaliatory prosecution case, *id.* at 252. There is no such complexity in cases involving arrests. There is no barrier to a plaintiff suing the actor who arrested him, or who "cause[d him] to be subjected" to an arrest, 42 U.S.C. § 1983. And this Court has already stated that the presumption of regularity simply "does not apply" to arrests. *Reichle*, 566 U.S. at 669. Finally, this Court's decision in *Devenpeck v. Alford*, 543 U.S. 146 (2004), and the lack of an instrument like an indictment or an information that can anchor the probable cause inquiry, makes it unworkable and unfair to extend the *Hartman* exception to cases involving arrests.

ARGUMENT

I. Petitioner's Sunshine Law suit and his public criticism of city policies and city officials are entitled to the highest level of First Amendment protection.

The litigation and civic involvement that sparked the city councilmembers' antagonism toward petitioner and preceded the order to arrest him lie at the heart of the First Amendment.

1. The First Amendment right to "petition the Government for a redress of grievances" is so fundamental as to be "implied by '[t]he very idea of a government, republican in form.'" *BE&K Const. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)). This right is "one of 'the most precious of liberties safeguarded by the Bill of Rights.'" *Id.* at 524 (quoting *United Mine Workers of Am. v. Ill. St. Bar Ass'n*, 389 U.S. 217, 222 (1967)). And the ability to seek redress *from the courts* is a central aspect of the Petition Clause. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). "[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." *NAACP v. Button*, 371 U.S. 415, 430 (1963).

Indeed, petitioner's action against the City under Florida's Sunshine Law is the epitome of a lawsuit protected by the Petition Clause. The Sunshine Law requires that local governments hold their meetings publicly and with proper notice. It is designed to ensure a "marketplace of ideas" in which government has "sufficient input from the citizens who are going to be affected by the subsequent action of the

municipality." *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 475 (Fla. 1974). The Sunshine Law enables citizens to monitor the work of their representatives. It instantiates Justice Brandeis's axiom that sunlight is the best disinfectant. Louis D. Brandeis, Other People's Money and How the Bankers Use It 92 (1914). In short, petitioner's lawsuit is protected precisely because of, and not despite, its consequences for city officials, *see* Pet. App. 3a, 17a-18a.

2. So, too, with respect to petitioner's criticisms of city policies and city officials over the months leading up to the November 2006 meeting. This sort of expression lies at the heart of the speech the First Amendment protects. Because "the Constitution created a form of government under which '[t]he people, not the government, possess the absolute sovereignty,'" the "right of free public discussion of the stewardship of public officials" is "fundamental." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274-75 (1964) (quoting James Madison, Report of 1800, *in* 4 Elliot's Debates on the Federal Constitution 569 (1863)).

3. Precisely because litigation and public criticism are essential to holding government accountable, this Court "has frequently reaffirmed that speech on public issues occupies the 'highest rung on the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Meyers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982)). This is particularly true where, as here, the expression comes from a private citizen.

Relying on this principle, this Court has explained that "[s]uch speech cannot be restricted simply because it is upsetting." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). It is "a bedrock principle underlying the

First Amendment" that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Even less can it suppress expression on the ground that the expression is upsetting, offensive, or disagreeable *to government officials*. "[D]ebate on public issues should be uninhibited, robust, and wide-open," and "it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co.*, 376 U.S. at 270. This Court long ago repudiated the doctrine of seditious libel in favor of a "'theory of our Constitution,' which values free speech as essential to, not subject to the vicissitudes of, our political system." *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 681 (1996) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

II. The First Amendment forbids the government from abusing its arrest power to retaliate against protected activity.

Governments cannot use their legitimate powers to retaliate against individuals who exercise their First Amendment rights. This longstanding prohibition on retaliation is particularly important when it comes to arrests, both because the arrest power is so sweeping and because the prospect of an arrest is so chilling of protected expression. The fact that a particular arrest does not *also* violate the Fourth Amendment—because information known to the arresting officer can support a finding of probable cause with respect to some offense—should not shield the responsible actor(s) from liability under the First Amendment. This Court has repeatedly held, in a variety of contexts, that a particular official action can

"implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992). Since the concerns at which the First and Fourth Amendments are directed are distinct, it is entirely possible for an arrest to violate one amendment but not the other. When it does, the plaintiff's ability to recover under Section 1983 for the violation of his rights under one amendment should not be foreclosed by the absence of a second constitutional violation.

A. Government cannot use its otherwise lawful powers to punish or deter protected expression.

Governments engage in myriad interactions with their citizens. This gives a government or official motivated by animus a variety of opportunities for retaliation against protected expression. A municipality might improperly deny an easement given to other property owners on account of "ill will resulting from the [owners'] previous filing of an unrelated, successful lawsuit against the Village." *Village of Willowbrook v. Olech*, 528 U.S. 562, 563 (2000) (per curiam). Or a county constable might improperly fire a clerical employee because she expressed distasteful views about the recent attempted assassination of the president. *Rankin v. McPherson*, 483 U.S. 378, 380-82 (1987).

The prospect that the government may deny benefits or impose burdens based on a person's protected expression may deter that individual from exercising his First Amendment rights. The consequences of that deterrence radiate outward to injure individuals beyond the aspiring speaker himself be-

cause the public has a stake in individuals' contributions to the marketplace of ideas. When government deters protected expression, it "limit[s] the stock of information from which members of the public may draw"—something the First Amendment directly "prohibit[s]." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

Accordingly, this Court has held, across a wide range of domains, that governmental actions "that fall short of a direct prohibition against the exercise of First Amendment rights" can still violate the Constitution. *Laird v. Tatum*, 408 U.S. 1, 11 (1972). Take, for example, *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996). There, a local government terminated a trash hauler's contract because he was an "outspoken critic" of the local government who had alleged violations "of the Kansas Open Meetings Act." *Id.* at 671. Even though local governments have broad discretion over their contracting, the Court held that terminating a contract purely to retaliate against protected expression violates the First Amendment. *Id.* at 686. These sorts of adverse actions are prohibited because they "allow the government to 'produce a result which [it] could not command directly.'" *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

In short, there is "longstanding recognition that the Government may not retaliate for exercising First Amendment speech rights." *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007). And the Court has further held that Section 1983 provides a cause of action for individuals who have been subjected to such retaliation. *See, e.g.*, *Umbehr*, 518 U.S. at 674-75; *Perry*, 408 U.S. at 597.

B. Use of the arrest power for retaliatory reasons is especially pernicious.

The right to criticize the government "without thereby risking arrest" is a "principal characteristic[] by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987). Two features of arrests make them an especially serious threat to First Amendment freedoms. First, the arrest power provides an opportunity for the government to retaliate against virtually every member of the public—and not just individuals who work for, or seek benefits from, the government. Second, the consequences of arrests may be especially chilling.

1. More than seventy-five years ago, Justice Jackson warned that "[w]ith the law books filled with a great assortment of crimes," there is a "fair chance of finding at least a technical violation of some act on the part of almost anyone." When the government "pick[s] the man and then search[es] the law books," government abuse of power becomes most dangerous. "It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group." Robert H. Jackson, The Federal Prosecutor 4-5 (1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.

Given the breadth of offenses in modern criminal codes, virtually every citizen has violated some law—or, more precisely, there is probable cause to believe he has done so. And once there is probable cause to believe a person has committed "even a very minor criminal offense" for which the only punishment is a fine, this is enough to justify a custodial arrest. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354

(2001); *see also id.* at 355-60 (listing statutes in all fifty states and the District of Columbia that permit warrantless misdemeanor arrests).

Such minor crimes are legion. In Florida, for example, a person can be arrested if there is probable cause to believe he has taken some computer paper home from the office without permission, Fla. Stat. § 815.06(2)(c); has buried his child's dead hamster less than two feet below ground level, Fla. Stat. § 823.041(1); has played a casual game of poker with friends, Fla. Stat. § 849.08; or has participated in his office's NCAA tournament pool, Fla. Stat. § 849.14. And beyond the sheer number of crimes, many offenses are so broad as to potentially support probable cause in a wide variety of circumstances. *See, e.g.*, Fla. Stat. § 823.01 (criminalizing "all nuisances that tend to annoy the community").

And that does not even count traffic offenses. "[V]ery few drivers can traverse any appreciable distance without violating some traffic regulation"; thus, "virtually everyone who ventures out onto the public streets and highways" may be subject to seizure as well. 3 Wayne R. LaFave, Search and Seizure § 5.2(e), at 156 (5th ed. 2012) (internal quotation marks and citation omitted). Even members of this Court have admitted to speeding. *See* Tr. of Oral Arg. 9, *Reichle v. Howards*, 566 U.S. 658 (2012) (No. 11-262) ("I might sometimes have driven 60 miles an hour in a 55-mile zone"); Tr. of Oral Arg. 27, *Maslenjak v. United States*, 137 S. Ct. 1918 (2017) (No. 16-309) ("I drove 60 miles an hour in a 55-mile-an-hour zone.").

2. The short- and long-term consequences of being arrested make arrest an especially powerful deterrent. "[A] person of ordinary firmness would be chilled from

future exercise of his First Amendment rights if he were booked and taken to jail in retaliation for his speech." *Ford v. City of Yakima*, 706 F.3d 1188, 1194 (9th Cir. 2013) (per curiam).

Once a person is arrested, he may end up spending two days in jail before any neutral magistrate reviews the arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991). Even individuals "suspected of committing minor offenses" can be repeatedly strip searched. *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 330 (2012). And for some people, the psychological effects of arrest are severe. *See* Robert I. Simon, *The Psychological and Legal Aftermath of False Arrest and Imprisonment*, 21 Bull. Am. Acad. Psychiatry & L. 523 (1993).

The long-term consequences of an arrest are severe enough to deter expression even if, as here, formal charges are never filed. Arrests become a matter of public record. A host of outside actors routinely review and use arrest records in making decisions about how to treat individuals. Among them are "immigration enforcement officials, public housing authorities, public benefits administrators, employers, licensing authorities, social services providers, and education officials." Elisha Jain, *Arrests as Regulation*, 67 Stan. L. Rev. 809, 810 (2015). A prior arrest—even one that took place long ago and resulted in no charges—can permanently affect a person's livelihood. Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, Wall St. J. (Aug. 18, 2014), http://on.wsj.com/2lV1viR.

The deterrent effects of an arrest also extend far beyond the individual who was arrested. Arrests often

occur in public. Petitioner's arrest, for example, was filmed, broadcast on local television, and later posted on the City's website for everyone to see. *See* Riviera Beach TV, https://tinyurl.com/1721RBTV (last visited Dec. 20, 2017). By arresting petitioner on camera, the City was able to "send [the] message," J.A. 180, 181, that any person in Riviera Beach who contemplates challenging city actions in court or criticizing city officials in public should think twice before doing so. And even beyond Riviera Beach, members of the public who read about or see what happened to Fane Lozman may hesitate to speak out in their own communities.

C. Compliance with the Fourth Amendment cannot shield an arrest from First Amendment scrutiny.

An arrest made without probable cause is always a Fourth Amendment violation. *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). By holding that the presence of probable cause is an "absolute bar" to a retaliatory arrest claim "brought under the First Amendment," Pet. App. 7a, the Eleventh Circuit's rule in effect makes proof of a Fourth Amendment violation an indispensable element of a First Amendment claim. This requirement undermines the central protections provided by the First Amendment and is inconsistent with this Court's decisions regarding constitutional rights generally and the First and Fourth Amendments in particular.

1. The Eleventh Circuit's absolute bar rule gives carte blanche for governments and government officials to undermine the First Amendment. It allows them to use arrests to retaliate against their critics or against individuals who engage in other forms of protected expression. Indeed, under the Eleventh

Circuit's rule, it does not matter how strong the proof is of a retaliatory motive.

To see how this is so, imagine a slightly different version of *Cohen v. California*, 403 U.S. 15 (1971). Instead of being arrested for disturbing the peace by wearing his famous jacket, this Paul Cohen is arrested for jaywalking on his way to the courthouse by an officer who announces, "I usually don't arrest people for this, but I hate you anti-war protesters." The Eleventh Circuit would impose an absolute bar on any Section 1983 claim as long as the officer had probable cause. In fact, even if it turned out that the officer lacked probable cause to believe Cohen had jaywalked, he would escape liability if it turned out there was probable cause for *any* offense in the statute book.

What is more, the Eleventh Circuit's rule would seem to permit a town to adopt a formal policy directing its police department to enforce a jaywalking statute against only those jaywalkers who are engaged in particular First Amendment-protected expression—say, wearing Black Lives Matter t-shirts or Make America Great Again hats. Because no individual arrested under the policy would have a First Amendment damages claim (since, after all, there would be probable cause for each individual arrest), it is unclear how anyone could sue to enjoin the policy. *See, e.g., Rizzo v. Goode*, 423 U.S. 362 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974).[8]

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[8] And the Eleventh Circuit's absolute bar is not limited to Petition Clause or Speech Clause cases. By its terms, it governs all "First Amendment claim[s]." *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002). Therefore, a city with an ordinance

Under the Eleventh Circuit's rule, the only arrestees who can vindicate their right to be free from retaliation are those injured by governments whose counsel prove so inept that they cannot find a single offense for which probable cause arguably exists. The Eleventh Circuit leaves unremedied arrests that have no valid law enforcement purpose and that concededly would never have occurred absent the desire to retaliate against protected expression.

2. The Eleventh Circuit's absolute bar confuses the prohibitions of the First and Fourth Amendments.

To begin, the interests the two amendments protect are not the same. The Fourth Amendment protects one's right to be left alone, while the First Amendment's Free Speech and Petition Clauses protect one's ability to communicate with others. Thus, the First Amendment is about "more than [simply] self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). A particular arrest can easily violate one provision but not the other. For example, in *Florida v. Royer*, 460 U.S. 491 (1983), the arrest of a nervous young man carrying heavy luggage who paid cash for his ticket violated the Fourth Amendment, because these facts did not give rise to probable cause to believe he had committed a crime. *Id.* at 507. It did not, however, violate the First Amendment, since Royer was not engaged in any protected expression.

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generally prohibiting animal slaughter within municipal limits is free to harass practitioners of Santeria by engaging in a series of catch-and-release arrests, even if it would never enforce the anti-slaughtering law against anyone else. *Cf. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

Conversely, in *City of Houston v. Hill*, 482 U.S. 451 (1987), this Court struck down a municipal ordinance that made it unlawful to interrupt a police officer in the performance of his or her duties. The ordinance was "admittedly violated scores of times daily." *Id.* at 466. The First Amendment infirmity came from the danger that, in selecting whom to arrest from among the individuals for whom there was probable cause, police would choose individuals who were engaged in "constitutionally protected speech." *Id.* Thus, the ordinance was unconstitutionally overbroad.

This Court has never required an individual seeking to prove that one constitutional right has been violated to prove that the government has violated a second constitutional prohibition as well. To the contrary, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal*, 506 U.S. at 56. When this is the case, the Court "examine[s] each constitutional provision in turn." *Id.* (citing *Hudson v. Palmer*, 468 U.S. 517 (1984); *Ingraham v. Wright*, 430 U.S. 651 (1977)).

In *Soldal* itself, the court of appeals had barred the plaintiff from challenging a seizure of his mobile home under the Fourth Amendment; it thought that the more "straightforward way for a plaintiff to mount a challenge under section 1983" was to "claim[] he was deprived of his property without due process of law." *Soldal v. Cook County*, 942 F.2d 1073, 1075 (7th Cir. 1991) (en banc). This Court rejected that approach. It explained that when a government act implicates more than one constitutional right, courts should reject the "habit" of identifying "the claim's 'dominant' character." *Soldal*, 506 U.S. at 70. They should,

instead, entertain every constitutional claim that fits the facts.[9]

This same directive applies in the context of First Amendment claims. In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), the defendant argued that because it could ban all newsracks if it chose to, it necessarily had the power to ban newsracks for particular publications. The Court was unpersuaded, recognizing that this "'greater-includes-the-lesser' syllogism" has no place in the First Amendment. *Id.* at 762-68.

The Eleventh Circuit's absolute bar rule contravenes this precedent. It rests on the proposition that because the government can arrest anyone for whom there is probable cause, there is no problem when the government arrests only the subset of people against whom it also possesses retaliatory animus. It is true that petitioner has no categorical right to be free from an arrest supported by probable cause. But he *does* have the First Amendment right not to be singled out for such an arrest based on his protected expression.

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[9] Similarly, in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), the Court emphasized that the First Amendment retaliation claim did not depend on establishing another constitutional violation. The government employee had "no constitutional right to a hearing" under the Due Process Clause before he was fired because, as an untenured employee, he had no property interest in the job. Yet the Court recognized that he "may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally-protected First Amendment freedoms." *Id.* at 283-84.

3. This Court's decision in *Whren* v. *United States*, 517 U.S. 806 (1996), confirms that probable cause for petitioner's arrest should not bar his First Amendment claim.

In *Whren*, this Court addressed the issue of pretextual traffic stops. It held that as long as such stops are based on "probable cause to believe [a driver] has committed a civil traffic violation," 517 U.S. at 808, they are permissible as a matter of Fourth Amendment law, even if the basis for the stop is different from the officer's motivation for making it. *Id.* at 813. Nonetheless, the Court explained, the *Fourteenth* Amendment imposes an independent prohibition against "selective enforcement of the law based on considerations such as race." *Id.* Adhering to this guidance, the courts of appeals have uniformly recognized that probable cause cannot immunize racially discriminatory law enforcement practices from equal protection scrutiny. *See, e.g.*, *Holland v. City of Portland*, 102 F.3d 6, 11 (1st Cir. 1996); *Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety*, 411 F.3d 427, 440-41 (3d Cir. 2005), *overruled on other grounds*, *Dique v. N.J. State Police*, 603 F.3d 181 (3d Cir. 2010); *United States v. Miller*, 146 F.3d 274, 279 n.3 (5th Cir. 1998); *Vakilian v. Shaw*, 335 F.3d 509, 521 (6th Cir. 2003); *Chavez v. Ill. State Police*, 251 F.3d 612, 635 (7th Cir. 2001); *Johnson v. Crooks*, 326 F.3d 995, 999-1000 (8th Cir. 2003); *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1166-67 (10th Cir. 2003).

The Eleventh Circuit's absolute bar is inconsistent with *Whren* and all of this case law. Respondent has acknowledged as much, suggesting that "an arrest motivated by protected speech may

constitute an arbitrary enforcement decision that gives rise to an equal protection claim," and that an equal protection challenge to an arrest can be brought "*even if* it were supported by probable cause." BIO 21. But if respondent is prepared to litigate the equal protection claim without requiring the plaintiff to show a lack of probable cause, there is no basis for imposing that requirement on an identical First Amendment claim.

Just as the presence of probable cause for a seizure is not dispositive of a race discrimination claim, it also does not determine whether the government is abusing its arrest power to retaliate against protected speech. Dr. Martin Luther King, Jr., was arrested and jailed for driving five miles above the speed limit outside Montgomery, Alabama. *See* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999, 1028 (1989). Had Dr. King sued for damages under Section 1983, it should not have mattered whether he had alleged that he was arrested because he was African American or had alleged that he was arrested due to his advocacy of racial equality. *See generally* Harry Kalven, Jr., The Negro and the First Amendment (1965).

III. Plaintiffs are entitled to a remedy when an arrest would not have occurred but for government officials' intent to retaliate for First Amendment activity.

1. This Court has a "well-established framework" for analyzing retaliation claims involving First Amendment-protected expression. *Texas v. Lesage*, 528 U.S. 18, 20 (1999) (per curiam). For forty years,

that framework has been applied to First Amendment retaliation claims across a broad range of contexts—from employment to government contracting to school library deacquisition policies to prison operations. *See, e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (employment); *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 685 (1996) (contracting); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982) (libraries).

The framework was first articulated in *Mt. Healthy*, 429 U.S. 274. In that case, a school board decided not to renew a schoolteacher's contract in "substantial part" because he had called a radio station to complain about school district policy. The call was "protected by the First Amendment." *Id.* at 283. But this Court held that those facts alone did not entitle the teacher to relief. Instead, the Court announced a two-step "test of causation." *Id.* at 286.

First, a plaintiff must show that his protected expression was a "motivating factor" with respect to the adverse action taken against him. *Mt. Healthy*, 429 U.S. at 287. That is, the plaintiff must prove "a [causal] connection between the retaliatory animus" and the government action he is challenging. *Hartman v. Moore*, 547 U.S. 250, 260 (2006).

If the plaintiff satisfies this burden, the defendant can still prevail if it can "show[] by a preponderance of the evidence that it would have reached the same decision" anyway. *Mt. Healthy*, 429 U.S. at 287. This "same-decision" defense establishes that "retaliation was not the but-for cause" of the challenged action. *Hartman*, 547 U.S. at 260. If the defense makes this showing, "the claim fails for lack of causal connection

between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official's mind." *Id.*

2. In a First Amendment retaliation case involving an arrest, the *Mt. Healthy* framework fairly allocates burdens between the parties. The plaintiff must plead and prove: (1) that he engaged in First Amendment-protected activity, (2) that the defendant harbored retaliatory animus, and (3) that the animus was a substantial factor in the decision to arrest him. At that point, if the plaintiff has met his burden, the government defendant can try to show (4) that the arrest would have occurred even absent the retaliatory animus. For several reasons, these elements help to properly "distinguish[] between a result caused by a constitutional violation and one not so caused." *Mt. Healthy*, 429 U.S. at 286.

First, there will be cases where the plaintiff's expression is not protected by the Constitution. Speech that itself proposes or constitutes a crime is unprotected. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Examples of this category include fraud, extortion, blackmail, true threats, and price-fixing conspiracies. And in particular circumstances, otherwise protected speech will lose its protection. For example, if a speaker during the non-agenda portion of a Riviera Beach City Council meeting refused to yield the floor after his allotted minutes, the fact that he was speaking about city zoning policies would not save him from arrest for disobeying that plainly valid, content-neutral time, place, and manner restriction. So, too, for speech that confesses to a crime. A person who "state[s] to FBI agents that he ha[s] burned his [draft] registration certificate because of his beliefs"

can be prosecuted for destroying the certificate. *United States v. O'Brien*, 391 U.S. 367, 369, 382 (1968).

By contrast, much expression *is* protected by the First Amendment. Petitioner's lawsuit, his months of criticism against the city redevelopment policy, and his comments at the November 15 meeting itself were entirely protected. *See supra* at 17-19. Nothing in any of his expression either constituted a crime or provided evidence of one.

Second, pleading and proof standards make it difficult for plaintiffs to establish animus. A bare assertion of an impermissible motive will not even survive the pleading stage. A plaintiff's complaint will be dismissed unless it pleads facts "plausibly suggesting" that the defendant's retaliatory animus was a cause of the arrest. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). If a plaintiff pleads nothing more than facts "merely consistent" with retaliation, the complaint will not survive. *See id.* In *Twombly* itself, the telephone companies' alleged behavior was equally consistent with activity prohibited and permitted by the Sherman Act. The Court therefore held that the facts alleged in the complaint were not enough to state a claim. *Id.* at 553-57; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009). Thus, allegations that are equally consistent with both forbidden retaliation and legitimate law enforcement activity do not state a claim. Plaintiffs will therefore need to do more than allege a temporal nexus between some protected speech and a subsequent arrest.

In short, it will be the rare case where a plaintiff can do something like petitioner did here: cite in his complaint an official transcript where government actors announced their intent to "intimidate" him or

"send a message." J.A. 176, 180-181. And even when a case survives a motion to dismiss, the plaintiff will still need to prove his allegations through the totality of the evidence.

Third, with respect to causation, the existence or nonexistence of probable cause can be highly probative. In a case where the plaintiff can prove both retaliatory animus and the absence of probable cause, his First Amendment claim is strong indeed. And even if there *is* probable cause, there are offenses for which police so rarely make arrests that the presence of probable cause will say almost nothing about whether a retaliatory motive caused the arrest. For example, when a government whistleblower is arrested for taking a few sheets of paper out of his office printer, Fla. Stat. § 815.06(2)(c), a factfinder may well conclude that animus led to the arrest.[10]

On the other hand, when there is probable cause to believe the plaintiff committed a serious crime, his assertion that he was arrested because of some protected expression will likely fail because his arrest is entirely "consistent," *Twombly*, 550 U.S. at 557, with legitimate law enforcement activity. For example, imagine a warehouse owner who brings a lawsuit challenging a municipal zoning ordinance as a regulatory

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[10] Publicly available statistical information can be helpful in determining whether certain crimes are commonly enforced. *See National Incident-Based Reporting System User-Manual*, Uniform Crime Reporting, 4-5, https://ucr.fbi.gov/nibrs/nibrs-user-manual (listing data entries collected by local police departments to report to the FBI, including "Offense Code" (indicating the nature of the crime) and "Type of Arrest" (indicating whether a citation was given or a custodial arrest took place)).

taking. If the warehouse burns to the ground and the police have probable cause to believe he committed arson, he will lose any First Amendment retaliation claim, however protected his takings lawsuit may have been.

Fourth, with respect to the same-decision defense, evidence regarding the presence of probable cause can likewise be relevant. Suppose a police officer sees a parked car bearing an anti-police bumper sticker. Angered at the message, the officer runs the plates, discovers that the owner is wanted for armed robbery, and arrests him. Even though there was retaliatory animus and some causal connection, the plaintiff's claim will fail. The discovery of probable cause with respect to a serious crime provides a "sufficient intervening event to break the causal chain." *Utah v. Strieff*, 136 S. Ct. 2056, 2061-62 (2016). This is because there is little doubt that an officer who had not noticed the bumper sticker but had run the plates would have made the exact same decision.

But probable cause will not always establish a same-decision defense. Petitioner's experience shows why. At the time Councilmember Wade ordered Officer Aguirre to arrest him, no one thought petitioner had violated Fla. Stat. § 871.01(1)—indeed, there is no evidence that anyone on the scene knew the statute existed. That is hardly surprising: There is only one other reported case in which this prohibition on "[d]isturbing schools and religious or other assemblies" has come into play with regard to events in a city council meeting. That case was decided over a quarter century before petitioner's arrest. Moreover, it actually reversed the conviction of a citizen whose vociferous criticism precipitated a brawl in the council

chambers. *See Weidner v. State*, 380 So. 2d 1286 (Fla. 1980).[11]

In light of the caselaw under Section 871.01(1), it is therefore unlikely that the City could establish a same-decision defense. If the jury is persuaded that petitioner's arrest was the product of retaliatory animus, it is unlikely the City will be able to persuade the jury that petitioner would have been arrested even had he been a random citizen or a booster of the redevelopment plan, rather than an outspoken critic.

3. The facts in *Reichle v. Howards*, 566 U.S. 658 (2012), further illustrate why imposing an absolute bar is unnecessary as well as improper. If *Bivens* even permits the litigation of First Amendment claims, the *Mt. Healthy* framework, as informed by the *Twombly/Iqbal* standard, will weed out claims like Howards'. When a person lays hands on the Vice President and then lies about it to Secret Service agents, a court should conclude that the plaintiff has not made out a prima facie case that retaliatory *animus* toward his protected criticism of the Vice President caused the arrest. And even if a court were to conclude that dislike of Howards' views played some role, it will almost certainly conclude that the physical contact and unprotected speech of making a false statement under 18 U.S.C. § 1001 show that the arresting officers would have made the same decision regardless. Finally, as *Reichle* illustrates, qualified immunity can provide an additional layer of protection

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[11] There is a paucity of reported prosecutions of any kind under Section 871.01(1): Westlaw contains only four decisions.

when it is not clearly established that arresting someone under particular circumstances constitutes forbidden retaliation.

4. Neither of the Eleventh Circuit's cases giving rise to its absolute bar rule provided any basis for abandoning the *Mt. Healthy* framework either. *Dahl v. Holley*, 312 F.3d 1228 (11th Cir. 2002), the sole case on which the Eleventh Circuit relied in its decision here, Pet. App. 7a, 11a, devoted only a single sentence to the question. *See* 312 F.3d at 1236. And *Dahl* involved an arrest *and full prosecution* on a felony charge of bribing a witness. *See id.* at 1231-32. The sole Eleventh Circuit decision *Dahl* cited in turn—*Redd v. City of Enterprise*, 140 F.3d 1378 (11th Cir. 1998)—involved an arrest for disorderly conduct that was "content-neutral; nothing in the record indicate[d] that the plaintiffs were selectively arrested for engaging in religious speech while non-religious speakers went unmolested." *Id.* at 1383. Both of these cases would fail under the *Mt. Healthy* standard, for reasons petitioner has already explained.

5. Since its inception, the *Mt. Healthy* framework has applied both to First Amendment cases alleging retaliation and to Fourteenth Amendment cases alleging purposeful racial discrimination. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977); *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (per curiam). Thus federal courts have uniformly applied the framework to claims involving racially discriminatory arrests. And they have done so without regard to whether those arrests violate the Fourth Amendment as well. *See supra* at 30. As a matter of doctrinal consistency, this Court should therefore hold that the *Mt. Healthy* framework applies

to First Amendment-based cases challenging arrests as well as to Fourteenth Amendment-based ones. The framework takes probable cause into account as one piece of potentially probative evidence, but imposes no absolute bar against challenging arrests supported by probable cause.

IV. *Hartman v. Moore* provides no basis for an absolute bar rule in cases involving arrests.

The Eleventh Circuit's absolute bar rule gives governments and government officials a blueprint for retaliating against citizens who exercise their First Amendment rights. If the government actor retaliates by terminating a contract or denying a zoning variance to someone who has exercised his Petition Clause right, it faces damages liability under Section 1983. *See Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668 (1996); *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). But if a government actor uses its arrest power to retaliate against him, the actor gets off scot free, so long as its lawyer can later identify some obscure, minor offense for which there might be probable cause. *See* Pet. App. 7a.

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court created an exception to the *Mt. Healthy* framework: "[A] plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges." *Id.* at 257. The City has argued that *Hartman* should be extended to suits in which the form of retaliation is an arrest. BIO 14-16. But a careful reading of *Hartman* shows why its rule cannot be extended to the context of arrests. As petitioner has already explained, *see supra*

at 22-31, a rule that precludes suits challenging retaliatory arrests unless plaintiffs can prove a lack of probable cause—as both the Eleventh Circuit's absolute bar rule and an extension of *Hartman* would do—seriously erodes First Amendment protections. And it does so for no reason: The questions of causation that motivated *Hartman* do not apply to cases involving arrests. Nor would the *Hartman* rule be workable or fair in arrest-related cases.

A. Absolute prosecutorial immunity makes "retaliatory prosecution" claims unique.

1. This Court's decision in *Hartman* rested on the need to reconcile First Amendment retaliation doctrine with the unique concerns that make exercise of prosecutorial power immune from review in civil cases.

The linchpin of this Court's analysis in *Hartman* is a simple fact: prosecutors are "absolutely immune from liability for the decision to prosecute." 547 U.S. at 262. This means that a plaintiff claiming he was prosecuted in retaliation for exercising First Amendment rights cannot sue the official who actually conducted the prosecution against him. Even in a case where a prosecutor decides to press charges for purely retaliatory reasons, Section 1983 provides no cause of action against him. Instead, the available remedies with respect to the prosecutor are dismissal of criminal charges on the basis of a defense of selective prosecution and discipline against the prosecutor as

an "officer of the court," *Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1976).[12]

So the category "retaliatory prosecution case" is actually a misnomer. As this Court explained, the defendant in such cases is a "nonprosecuting official" who is sued not "strictly for retaliatory prosecution, but [rather] for successful retaliatory inducement to prosecute." *Hartman*, 547 U.S. at 262. Liability for inducement falls comfortably within the scope of Section 1983, which provides a cause of action against a government actor that either "subjects, or causes to be subjected" any person to a deprivation of his constitutional rights. 42 U.S.C. § 1983.

Showing that someone has engaged in retaliatory inducement of a prosecution has two elements. First, as with any retaliation case, the defendant's actions must be based on animus against the plaintiff's protected expression. Second, the defendant's actions must actually have induced the prosecution—that is, the plaintiff has to show that absent the

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[12] Absolute prosecutorial immunity protects the prosecutorial function, not the prosecutor as a person. If a prosecutor violates an individual's constitutional rights while "perform[ing] the investigative functions normally performed by a detective or a police officer," he faces damages liability. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). It is "'neither appropriate nor justifiable'" to confer absolute immunity in these circumstances. *Id.* (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir. 1973)).

Furthermore, under the logic of this Court's decision in *Forrester v. White*, 484 U.S. 219 (1988), "a district attorney who hires and fires assistant district attorneys" is acting in his "administrative capacity" and is thus amenable to suit under Section 1983 if he engages in First Amendment retaliation while "making such employment decisions." *Id.* at 229.

nonprosecuting official's having acted on his animus, there would have been no prosecution.

It is at this second point that a "chain of causation" problem comes into play. *See Hartman*, 547 U.S. at 262-63. Prosecutors are expected to act with "independence." *Imbler*, 424 U.S. at 423 (quoting *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. Dist. Ct. App. 1935)). This entails their making their own judgment as to whether prosecution is warranted, rather than relying on the decisions of complainants or law-enforcement officials. Prosecutorial immunity rests on a "presumption of regularity" that attaches "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14 (1926), and *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

When there is probable cause for a prosecution, allowing a retaliation suit to proceed would undermine prosecutorial independence. The plaintiff in such a suit could prove inducement only by persuading the court that the probable cause was not the real reason the prosecutor decided to proceed. To do that would require looking into the prosecutor's motives and decisionmaking—precisely the inquiry absolute prosecutorial immunity forestalls. Thus, in order to protect prosecutorial independence, courts must accept that the explanation for a prosecution for which there is probable cause is that a prosecutor made an independent judgment that the prosecution was warranted. That is what this Court meant in *Hartman* when it referred to the "presumption of regularity." 547 U.S. at 263. The "intervening decision of the third-party

prosecutor widens the causal gap between the defendant's animus and the plaintiff's injury." *Reichle*, 566 U.S. at 668.

By contrast, when there is no probable cause for a prosecution, by definition courts know that something in the prosecutorial decisionmaking process has failed. To allow a Section 1983 damages lawsuit against a nonprosecuting official to proceed under these circumstances does not require courts to examine the prosecutor's decisionmaking. The only question is whether the nonprosecuting official who has been sued induced the prosecution—that is, filed the initial complaint or brought the case to the prosecutor's attention—and whether he did so to retaliate against the plaintiff's protected expression. If he did, he should be held liable.[13]

2. A case in which a plaintiff challenges an arrest on the grounds that it was the product of retaliatory animus is altogether different.

In an arrest case, there is no question of absolute immunity preventing an aggrieved person from suing the actor who arrested him, or who "cause[d him] to be subjected" to an arrest, 42 U.S.C. § 1983. In many cases, the defendant will be the actual line-level officer who took the plaintiff into custody. These officers are not entitled to absolute immunity. *Pierson v. Ray*, 386 U.S. 547, 555 (1967). In these cases, the animus and the injury are united entirely in a single actor.

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[13] Theoretically, there might be a case in which a malicious nonprosecuting official could show that the prosecutor would have gone forward without probable cause in any event. But it is difficult to imagine this happening in practice.

And even when the defendant is a municipality or a higher-level official instead of (or in addition to) the arresting officer, there is no potentially responsible actor whose decisions are beyond scrutiny. Whereas every "retaliatory prosecution" suit must proceed without the prosecutor—and without probing the decision to prosecute—when *arrests* are challenged as retaliatory, there is no issue of staging Hamlet without the Prince. All responsible actors are subject to suit for constitutional violations, and the causal chain is straightforward. In contrast to a prosecutor, who is presumed to act as a brake on any animus held by actors further back in the causal chain, there is no reason to assume that an arresting officer has acted as an independent check on his supervisors or his employer.

Petitioner's case illustrates the point. The district court described the facts as supporting an inference that "the officer, a young officer, present in a city council meeting, hearing a councilwoman—and frankly, a councilwoman like Ms. Wade, who is a very persuasive person just simply followed her direction" to arrest petitioner. Tr. 14 (12/12/2014), ECF No. 784. The City Council's official minutes stated that petitioner "was escorted out to [sic] the meeting at the request of Councilperson Wade." City of Riviera Beach, Regular City Council Meeting Minutes at 4 (Nov. 15, 2006), https://tinyurl.com/RBMin1115. No one would expect an officer in this situation to conduct an independent assessment of probable cause and then tell the presiding city councilmember, "No, I refuse to 'carry him out,' because I am not sure whether I have probable cause to do so."

By contrast, prosecutors are never required to act in the moment when they decide whether to prosecute. And they frequently decline prosecutions. The independent decisionmaking of prosecutors is a far cry from the "'competitive enterprise of ferreting out crime'" and arresting suspects. *Giordenello v. United States*, 357 U.S. 480, 486 (1958) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

Indeed, this case shows the stark difference between prosecutors and other government actors. Once the state's attorney came into the picture, the charges against petitioner were dismissed because "there was 'no reasonable likelihood of successful prosecution,'" Pet. App. 5a. Indeed, the district court seconded that decision when it concluded that there was no probable cause for either of the charges listed on the notice to appear. *See* J.A. 105, 108. On the other hand, petitioner was arrested without any government official having the faintest idea what criminal law he might have violated. There is no justification for giving the City prosecutorial immunity from liability or extending *Hartman*'s exception.

Courts regularly look behind the decisions of police officers and municipalities to determine whether or not they acted with a constitutionally forbidden motivation. Thus, the "legal obstacle" present in *Hartman* does not exist in retaliation-by-arrest cases. *Hartman*, 547 U.S. at 263. And because there is no such obstacle, once a plaintiff carries his burden under *Mt. Healthy*, the burden should shift to the defendant to show that he would have made the arrest regardless.

B. Litigating probable cause in retaliatory arrest cases is entirely different from litigating the issue in retaliatory prosecution cases.

In *Hartman*, this Court distinguished retaliatory prosecution cases from "ordinary" retaliation cases by noting that in the former, "there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge." *Hartman*, 547 U.S. at 261. The Court also reasoned that pleading and proving the absence of probable cause would be "cost free" to both the plaintiff and the court. *Id.* at 265. Petitioner's case offers a textbook example of why those assumptions do not carry over to First Amendment retaliation cases involving arrests.

1. Far from there being a "distinct body" of evidence with respect to "the criminal charge," petitioner's trial shows how First Amendment arrest cases can produce a shifting morass of potential charges.

In retaliatory prosecution cases, the putative plaintiff will have an indictment or charging instrument that cabins the probable cause inquiry by identifying a specific crime. The plaintiff need only plead and prepare to prove a lack of probable cause for the crimes actually charged. In *Hartman* itself, this meant the seven counts in the indictment, which involved mail and wire fraud, theft of property used by the Postal Service, and receiving stolen property. *See* Petrs' Br. 7, *Hartman v. Moore*, 547 U.S. 250 (No. 04-1495) (describing the counts in the indictment). Hartman was not required also to show that there would

have been no probable cause to prosecute him for, say, RICO or violations of the federal bribery or false-statement statutes.

But in retaliation cases involving *arrests*, the "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). Therefore, a plaintiff cannot know, short of reading the entire criminal code, the range of possible crimes for which he must establish an absence of probable cause. Even if the plaintiff were to have an arrest report or similar document alleging specific crimes, that document would not cabin the probable cause inquiry. So long as the facts known to the arresting official support probable cause for *some* crime—however minor, and regardless whether the crime was the actual reason for the arrest—the probable cause standard is satisfied.

2. Petitioner's case illustrates the problem the *Devenpeck* rule creates in the context of a lawsuit claiming an arrest in retaliation for First Amendment activity. City officials did not need to think of a crime for which there was probable cause to arrest petitioner. They could confidently assume that the City's lawyers would be able to dig up *some* statute that might retroactively provide probable cause. Years after the arrest, and weeks into petitioner's trial, the Eleventh Circuit's absolute-bar rule required petitioner to respond to a shifting set of possible offenses for which there might conceivably have been probable cause. Surely, petitioner should not have been required to plead the lack of probable cause to believe he had "willfully interrupt[ed] or disturb[ed] any school or any assembly of people met for the worship

of God or for any lawful purpose" in violation of Florida Statutes Section 871.01(1), when he had never been charged with violating that statute, or given notice that it might apply to his conduct.[14]

And if petitioner was not required to plead the absence of probable cause to arrest him pursuant to Section 871.01(1), how can it be that he was required to disprove probable cause under that provision when it "popped up" midway through a multiweek civil trial, Tr. 8 (12/12/2014), ECF No. 784, eight years after his arrest? The mind reels at the sprawling mess such a rule makes of the pleading, discovery, and trial processes. Whatever else is true, this can hardly be the "cost free" regime *Hartman* saw in retaliatory prosecution cases, 547 U.S. at 465.

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[14] *Cf.* John Jay Osborne, Jr., The Paper Chase xii (40th anniversary ed. 2011) (quoting the fictitious case *Rex v. Haddock*, Misl. Cas. C. Law at 31) ("[C]itizens who take it upon themselves to do unusual actions which attract the attention of the police should be careful to bring these actions into one of the recognized categories of crimes and offenses for it is intolerable that the police should be put to the pains of inventing reasons for finding them undesirable...").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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(continued from front cover)

QUESTION PRESENTED

In *Hartman* v. *Moore*, 547 U.S. 250 (2005), this Court held that probable cause defeats a First Amendment retaliatory-prosecution claim as a matter of law. Does probable cause likewise defeat a First Amendment retaliatory-arrest claim?

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OTHER AUTHORITIES

William Baude & James Y. Stern,
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STATEMENT

1. A City Council governs the City of Riviera Beach, Florida. It holds bimonthly meetings, open to the public, at which it conducts city business. JA 102–03. Toward the end of these meetings, members of the public may address the Council on any matter relating to the City. JA 68, 75–78. But the issues have to relate to the City; "it would not," for example, "be appropriate for someone to come in [to a City Council meeting] and just simply read the editorial section of the New York Times," since "that would have nothing to do with the City of Riviera Beach." Pet. 12a (quoting the District Court's analysis).

Fane Lozman began regularly attending Council meetings almost immediately upon moving to the City in 2006. Lozman is one of many outspoken opponents of the City's plan to redevelop the Riviera Beach marina. He typically used his allotted time to air grievances against City leadership, almost always making vague accusations of corruption and threatening electoral and criminal consequences.

The councilmembers recognized the importance of giving citizens the opportunity to criticize their elected representatives. JA 70. So they let Lozman harangue them without interruption. They did so even on May 17, 2006, when he threatened to launch recall proceedings against a councilmember if she did not resign by noon the next day. ECF 820, ex. 2. And they did so again on June 21, when Lozman asked the public for information regarding mayoral corruption that he could share with "investigators." *Id.*, ex. 3.

2. According to Lozman, the City's hostility to him increased after a closed-door meeting that the Council held on June 28, 2006. As allowed by Florida law, the Council met in private to consult with the City's lawyers in several cases challenging the marina-redevelopment plan, one of which Lozman jointly filed with another City resident. Lozman alleges that, during this meeting, the Council adopted a policy of retaliating against him. But the Council never adopted any such policy. It resolved only to take whatever permissible steps it could to convince the courts and the public of the redevelopment plan's merit.

Lozman's contrary view rests on a mischaracterization of the transcript of that meeting. Specifically, he points to one statement from a single, frustrated councilmember, who vented: "I think it would help to intimidate the same way as [law enforcement] is coming to my house." JA 176. Lozman claims that the Council agreed to this approach by "consensus" (Brief 4), but that is not what happened. Instead, the very same councilmember immediately moved on to address the importance of developing a strategy to defeat these suits. The Council reached a "consensus" only after further discussion consisting of five pages of transcript in the Joint Appendix. JA 181. And rather than agreeing to retaliate against Lozman or anyone else, the Council reached a consensus to invest the money and resources needed to prevail in litigation. JA 181. Every then-councilmember who took the stand below testified to this effect. *See* ECF 770 at 47, 51, 74–75, 126–27; ECF 771 at 153–54. In fact, one member who was "friends with Mr. Lozman" explained that he never would have agreed

to a policy of retaliating against him. ECF 771 at 185–88.

The Council continued allowing Lozman to speak uninterrupted at its meetings in the weeks and months that followed. For example, it allowed him to speak uninterrupted on July 5, when he suggested that the mayor violated federal law by supposedly acting as a "paid lobbyist" for developers. ECF 820, ex. 4. The Council allowed Lozman to finish his remarks on July 19, when he accused the mayor of making racist comments about then-Governor Jeb Bush, and stated that "the escalation and tension between the mayor and myself will continue to accelerate as the course of action I have put into motion to get him indicted for corruption and removed from office marches forward." *Id.*, ex. 5. And it allowed him to complete his remarks when, on September 6, he accused the mayor's brother of biting someone, and asked whether the mayor would require his brother to wear a muzzle. *Id.*, ex. 7.

3. This case now centers on a single instance in which Lozman did not finish his remarks. At the November 15 City Council meeting, Lozman approached the podium. But rather than addressing alleged misconduct by *city* officials—the topic of his previous speeches—Lozman addressed corruption by former Palm Beach *County* officials. *See Activist Arrested at Riviera Beach Council Meeting*, YouTube (Sep. 15, 2009), https://tinyurl.com/lbj5qqj; ECF 820, ex. 8. Because county corruption had no relation to city business, JA 68–69, Councilmember Elizabeth Wade interrupted Lozman, informing him that he could not "stand up and go through that kind of ...." Pet. 4a. Before she finished, Lozman exclaimed "yes,

I will," and resumed his discussion of corruption in the county government. Pet. 4a.

After failing to redirect Lozman, Wade called out: "Officer?" Francisco Aguirre, a police officer providing security for the night's meeting, had never heard of Lozman, attended a City Council meeting, or met any of the councilmembers. Officer Aguirre approached Lozman, whom he quietly asked to follow him outside. When Lozman refused, Officer Aguirre gave him another chance, informing him: "You're going to be arrested if you don't walk outside." Lozman again refused, telling Officer Aguirre that "[he] was not walking outside" because he had not "finished [his] comments." After Officer Aguirre began reaching for his handcuffs, Wade spoke up, asking Aguirre to "carry him out." Instead, Aguirre placed Lozman under arrest before calmly removing him from the meeting. *See* Pet. 4a.

4. Lozman sued the City under § 1983 and a variety of state-law tort theories, including false arrest and battery. His § 1983 action alleged that the City retaliated against him in a number of ways, just one of which is relevant here: Lozman claimed that the City Council adopted a policy of retaliating against him because of his political activism, that Wade asked Officer Aguirre to arrest him because of that policy, and that Officer Aguirre acted on her request. This, Lozman argued, violated the First Amendment.

Eleventh Circuit precedent requires a retaliatory-arrest plaintiff to prove that the police lacked probable cause to make the arrest. *See Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002). Thus, one issue

at trial concerned whether Office Aguirre had probable cause to arrest Lozman. Under Florida law, anyone who "willfully interrupts or disturbs any school or any assembly of people met for the worship of God or for any lawful purpose commits a misdemeanor of the second degree." Fla. Stat. § 871.01. The district court concluded that there was enough evidence to create a jury question regarding whether Officer Aguirre had probable cause to arrest Lozman under this provision, and instructed the jury accordingly. JA 132–35. The district court declined to instruct the jury on three additional crimes that the City argued supported a finding of probable cause: disorderly conduct, trespass after warning, and resisting an officer in the lawful performance of his duties.

After hearing these instructions, the jury returned a verdict in favor of the City on every single one of Lozman's claims, including his First Amendment retaliatory-arrest claim. JA 140–47. Lozman appealed to the Eleventh Circuit. There, he argued that he was entitled to a new trial because "the jury's verdict finding probable cause to arrest ... was against the great weight of the evidence." Pet. 7a. He did not dispute, however, that he had to prove a lack of probable cause in order to prevail in his First Amendment retaliatory-arrest claim. The Eleventh Circuit thus applied its precedent requiring such proof. And the Eleventh Circuit affirmed, because it found the evidence of probable cause sufficient to justify the jury's verdict in favor of the City.

SUMMARY OF ARGUMENT

A plaintiff who alleges a retaliatory arrest in violation of the First Amendment must plead and prove

that the defendant lacked probable cause to make the arrest.

I. This case is about determining "the elements of, and rules associated with, ... action[s] seeking damages" for constitutional torts. *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 920 (2017). All four of the factors that this Court considers in performing that function—constitutional principles, tort principles, the distinctive features of the claim at issue, and the values underlying the constitutional right—support the probable-cause element.

A. Start with constitutional principles. In *Hartman* v. *Moore*, this Court held that a plaintiff who claims a retaliatory *prosecution*—in other words, a plaintiff who alleges that an officer prompted a prosecutor to file charges against him in retaliation for his speech—must plead and prove the absence of probable cause. 547 U.S. at 265–66. A plaintiff who claims a retaliatory *arrest* should have to make the same showing; after all, courts have traditionally "treated retaliatory arrest and prosecution claims similarly." *Reichle* v. *Howards*, 566 U.S. 658, 667 (2012). Indeed, requiring plaintiffs to satisfy this objective probable-cause element fits with this Court's longstanding "rejection of [purely] subjective inquiries" when reviewing the constitutionality of police conduct. *Michigan* v. *Bryant*, 562 U.S. 344, 360 n.7 (2011).

B. In addition, the probable-cause element has an ancient tort-law pedigree. At common law, a plaintiff who endures an improperly motivated arrest may sue for malicious prosecution or false imprisonment.

But for hundreds of years, probable cause has defeated each of these tort claims, regardless of the defendant's motive.

C. This longstanding common-law rule makes sense in the context of retaliatory-arrest claims. First, officers must *often* consider protected speech when deciding whether to make an arrest instead of issuing a citation or letting an offender go. Most obviously, a suspect's speech may provide "evidence of a crime." *Reichle*, 566 U.S. at 668. And even speech that does not provide evidence of a crime may still properly influence an officer's discretionary decision to arrest. For example, if police observe someone illegally driving a van through the parking lot of a federal building with the sign "Remember the children of Waco," they might reasonably decide to arrest the driver rather than issue a citation, buying them time to determine whether the driver is a concerned citizen or another Timothy McVeigh. *See Kilpatrick* v. *United States*, 432 Fed. App'x 937, 939 (11th Cir. 2001) (*per curiam*). The probable-cause element permits officers to make arrests in such circumstances without fear of having to later litigate whether their *real* motivation was preventing a massacre or punishing speech.

The probable-cause element matters even with respect to arrests having nothing to do with speech. Without it, officers in the field will be unable to predict whether any given arrest will lead to an expensive, time-consuming trial, and to potential liability. Almost every arrest involves some verbal exchange between officer and suspect. And arrestees often wear t-shirts or display bumper stickers expressing

controversial ideas. Thus, in almost every retaliatory-arrest case, there will be a factual dispute regarding the officer's real motivation—even when the officer did not consider speech at all. This means that almost every case will make it to a jury. Once there, the jurors will be left to speculate about the officer's *real* motivation, which will almost always be inscrutable. The near-certainty of trial, and the uncertainty of its resolution, will deter "all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.). The probable-cause element prevents this.

D. The probable-cause element promotes all of these objectives while still respecting the values underlying the First Amendment. The arrests that are most likely to be retaliatory and that pose the greatest threat to freedom of speech are arrests *unsupported by probable cause*. The probable-cause element ensures that courts can still punish such arrests. By contrast, arrests backed by probable cause are unlikely to be retaliatory and likely pose no realistic danger to the freedom of speech. The probable-cause element helps screen out claims involving such arrests, enabling police to continue protecting society. In addition, the probable-cause element allows police officers to keep order—and thereby foster speech—at protests, marches, and other politically charged events. The lack of a probable-cause safe harbor would discourage officers securing such events from doing their duty, since a lawbreaker could easily allege that the real reason for his arrest was his speech rather than his crime.

II. Lozman's contrary arguments are unpersuasive. Lozman relies principally on *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), where the Court adopted a three-step framework for government employees' retaliation claims. First, the plaintiff must prove that he engaged in protected speech. Next, he must prove that his speech substantially motivated the defendant's decision. Finally, the defendant may prove that it would have made the same decision regardless.

Mt. Healthy's three-part test makes no sense in the arrest context. The First Amendment allows officers to arrest suspects when their speech "provides evidence of a crime or suggests a potential threat." *Reichle*, 566 U.S. at 668. Thus, speech *can be* a substantial factor in the decision whether to make an arrest. Lozman tries to account for this by adjusting *Mt. Healthy*'s second step to require proof that "animus" toward protected speech was a substantial motivating factor in the decision whether to arrest. (Brief 33.) But this subjective evaluation of officer intent will be speculative in almost every case. *Mt. Healthy*'s framework makes sense for resolving employment retaliation cases, where there often *is* significant evidence of intent, ranging from documentary evidence to the employer's treatment of similarly situated individuals. But no such evidence is likely to exist in the highly charged, one-off context of an arrest. Adopting *Mt. Healthy* would sacrifice all the advantages of an objective test for a system in which juries decide whether to award relief on the basis of guesswork—leaving police officers in the wind.

Lozman and his amici also suggest that the Nation faces an epidemic of retaliatory arrests. They offer little evidence to back up this empirical claim. Lozman's brief rests entirely on hypotheticals; it does not discuss a single, proven, real-world instance of a suspect's being arrested in retaliation for his speech. And the examples that most trouble amici involve arrests *without probable cause*—which, of course, would remain punishable even with a probable-cause element. This dearth of retaliatory arrests is unsurprising. Statutes limiting the ability to arrest for minor offenses, the significant costs attendant to unnecessary arrests, and the "good sense" and "political accountability of most local lawmakers and law-enforcement officials," *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 353 (2001), have prevented this imagined parade of horribles from coming to pass, including in jurisdictions that have long required proof of the absence of probable cause.

ARGUMENT

I. A Plaintiff Alleging Retaliatory Arrest Must Show the Lack of Probable Cause

This case is about "determin[ing] the elements of, and rules associated with, an action seeking damages" for a constitutional tort—the tort of retaliatory arrest. *Manuel*, 137 S. Ct. at 920. To identify the elements of a constitutional tort, this Court considers principles of constitutional law, principles of tort law, the distinctive features of the claim, and the values underlying the right. All four factors support requiring a plaintiff who alleges a retaliatory arrest to plead and prove the absence of probable cause.

A. Constitutional principles support a probable-cause element

This Court first considers principles of "constitutional law"—both those underlying the right at issue and analogous principles from "other areas of constitutional law." *Mt. Healthy*, 429 U.S. at 286. Those principles show that plaintiffs claiming retaliatory arrest must prove the absence of probable cause.

1. This Court's most analogous First Amendment decision, *Hartman* v. *Moore*, supports the probable-cause element. The plaintiff, Moore, lobbied hard to get the Postal Service to keep using a particular scanning technology. Along the way, he criticized the Postal Service before Congress. Moore succeeded in his lobbying efforts, but he soon faced criminal charges supposedly stemming from those efforts. After securing an acquittal because of the "complete lack of direct evidence" against him, Moore sued the postal inspectors for "inducing [his] prosecution in retaliation for [his] speech." 547 U.S. at 252, 254. This Court held that, to bring and win such a claim against law-enforcement officers, Moore had to "plea[d] and prov[e]" the "absence of probable cause." *Id.* at 265–66.

Hartman supports a probable-cause element for First Amendment retaliatory-arrest claims too. Courts have traditionally "treated retaliatory arrest and prosecution claims similarly" in light of the "close relationship" between them. *Reichle*, 566 U.S. at 667. In fact, many cases feature "allegations of both retaliatory arrest and retaliatory prosecution" because the same officer who makes the arrest often instigates the prosecution. *Id.* Each claim involves

the same basic allegation: the defendant police officer invoked the criminal process against the plaintiff speaker in retaliation for his protected speech. Each also presents the same fundamental difficulty: a "tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." *Id.* at 668. Under either theory, something other than animus—the prosecutor's independent decision to prosecute, or the officer's decision to arrest for reasons unrelated to animus toward the arrestee's speech—may have led to the supposed retaliatory action. *Id.* This kinship suggests there should be "no distinction between claims of retaliatory arrest and claims of retaliatory prosecution when considering the relevance of probable cause." *Id.* at 667.

2. A probable-cause element also comports with the general constitutional principle that courts should use "objective" tests—and should reject wholly "subjective" inquiries—when judging police officers' conduct. *Bryant*, 562 U.S. at 360 & n.7. This Court has applied this principle in a variety of cases, under a variety of provisions of the Bill of Rights. *See, e.g.*, *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991) (occurrence of a "seizure" depends on "objective test"); *Whren* v. *United States*, 517 U.S. 806, 813 (1996) (reasonableness of a search or seizure does not depend on officer's "state of mind"); *United States* v. *Leon*, 468 U.S. 897, 922 n.23 (1984) (good-faith exception to exclusionary rule does not depend on "inquiries into the subjective beliefs of law enforcement officers"); *Rhode Island* v. *Innis*, 446 U.S. 291, 301–02 (1980) (occurrence of "interrogation" for purposes of *Miranda* does not depend on "the intent of the police"); *J.D.B.* v. *North Carolina*, 564 U.S.

261, 271 (2011) (characterization of interrogation as "custodial" for purposes of *Miranda* does not depend on "the subjective views harbored by ... the interrogating officers"); *New York* v. *Quarles*, 467 U.S. 649, 656 (1984) (public-safety exception to *Miranda* does not depend on "the subjective motivation of the arresting officer"); *Bryant*, 562 U.S. at 360 (application of the Confrontation Clause to police interrogations depends on "an objective analysis of the circumstances").

Even where a constitutional provision inherently requires some inquiry into a law-enforcement officer's state of mind, the Court has incorporated objective backstops into the constitutional rule, avoiding tests that turn on subjective motivation alone. For instance, an Eighth Amendment claim against a prison officer has both a "subjective component" and an "objective component": the plaintiff must show both that the officer acted "with a sufficiently culpable state of mind" and that the harm he inflicted was "sufficiently serious." *Wilson* v. *Seiter*, 501 U.S. 294, 298 (1991). An equal-protection claim alleging selective prosecution likewise has both a subjective and an objective component: the challenger must show that the prosecutor "was motivated by a discriminatory purpose" and that "similarly situated individuals of a different race were not prosecuted." *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996).

There are good reasons for avoiding purely subjective inquiries—reasons fully applicable to the arrest context. Police officers work in tense, high-pressure, fast-moving situations. They must make split-second decisions; a moment's hesitation may make the

difference between safety or danger or between apprehension and escape. As a result, they need the "clear guidance" embodied in "categorical rules." *Riley* v. *California*, 134 S. Ct. 2473, 2491 (2014). Purely subjective standards deny officers the clarity they need; an officer would have to speculate about how a court or jury will reconstruct his motives after the fact in order to know whether his action will be upheld. It is better to give officers a bright-line rule: if you have probable cause you may arrest without fear of liability; without probable cause, you may not.

Objective tests also protect officers from the burdens of trial on insubstantial claims. As Chief Judge Learned Hand explained, "it is impossible to know whether [a] claim [of improper motive] is well founded until the case has been tried." *Gregoire*, 177 F.2d at 581. To make motive alone decisive, therefore, is "to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome." *Id.* This burden would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Id.* Here, an objective probable-cause element, unlike a subjective test, shields officers from baseless litigation, preserving the incentives to discharge their duties without hesitation.

Last, objective tests enable courts to do *their* jobs. Officers often "act with different motives simultaneously or in quick succession," especially in "emergency situation[s]." *Bryant*, 562 U.S. at 368. As a result, "there is no reason to believe that courts can with any degree of success determine in which instances the police had an ulterior motive." *Missouri*

v. *Seibert*, 542 U.S. 600, 626 (2004) (O'Connor, J., dissenting) (quoting Wayne LaFave, *Search & Seizure*, § 1.4(e), p. 124 (3d ed. 1996)). Any legal test that turns on "post hoc findings ... concerning the subjective motivation of the arresting officer" will therefore tend to promote uneven and unreliable results. *Quarles*, 467 U.S. at 656. An objective probable-cause element avoids these problems, allowing courts to uphold objectively legitimate arrests without sorting through the arresting officer's varied motives.

B. Tort principles support a probable-cause element

When identifying the elements of a constitutional tort, this Court also considers "the common law of torts." *Manuel*, 137 S. Ct. at 920; *see, e.g.*, *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994). For good reason. First, the Constitution itself "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 654 (1898). At the framing, "the only way to enforce" the Bill of Rights "was through private law remedies, such as trespass and false imprisonment"; as a result, the elements of those causes of action served as "threshold test[s]," "necessary ... condition[s] for hauling an officer into court." William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1840–41 (2016). Second, "Congress intended [§ 1983] to be construed in the light of common-law principles that were well settled at the time of its enactment," and it accordingly makes sense to "examin[e] common-law doctrine when identifying ...

the elements of the cause of action." *Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997). Finally, the common law reflects wisdom accumulated "over the centuries." *Carey* v. *Piphus*, 435 U.S. 247, 257 (1978).

1. Two common-law tort theories address improperly motivated arrests: malicious prosecution and false imprisonment. Probable cause defeats each type of claim.

Malicious prosecution is the tort of "put[ting] the criminal law in force"—including by making an arrest—because of an "evil motive." *Wheeler* v. *Nesbitt*, 24 How. 544, 550 (1860). False imprisonment is the tort of confining someone against his will. *Wallace* v. *Kato*, 549 U.S. 384, 388–89 (2007). Plaintiffs can use these two tort theories to sue over arrests made in retaliation for speech. For example, a plaintiff may bring a malicious-prosecution claim against an officer who arrests him for being "too mouthy," *Stoecker* v. *Nathanson*, 98 N.W. 1061, 1061 (Neb. 1904), for the purpose of "knock[ing] him out of a political appointment," *id.*, or "for the purpose of ... administering to [the officer's] vanity," *Gee* v. *Culver*, 11 P. 302, 304 (Or. 1885). Similarly, a plaintiff may bring a false-imprisonment claim against an officer who arrests him "because [the plaintiff] had previously reported [the officer]" for misconduct. Restatement (First) of Torts § 127 (1934). Indeed, Lozman brought one in this very case. *Supra* 4.

Probable cause defeats claims for malicious prosecution and false imprisonment. The "want of probable cause" is an element of malicious prosecution. *Stewart* v. *Sonneborn*, 98 U.S. 187, 192 (1878). Thus,

if the arresting officer "had probable cause," "the motives by which he was actuated ... are not material." *Crescent City Livestock Co.* v. *Butchers' Union Slaughter-House Co.*, 120 U.S. 141, 149 (1887). "Malice alone, however great, ... is insufficient to maintain an action in damages." *Id.* This rule dates back at least to Lord Mansfield, and it remains the law today. *See Farmer* v. *Darling*, 4 Burr. 1971, 1974 (K.B. 1766); *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 63 & n.7 (1993).

Similarly, since "time immemorial," probable cause has defeated a claim for false imprisonment. *Hawley* v. *Butler*, 54 Barb. 490, 492 (N.Y. 1868); *see Director General of Railroads* v. *Kastenbaum*, 263 U.S. 25, 27–28 (1923). Whether the officer had an "ulterior motive" has never mattered. First Restatement § 127, comment a. For example, if "A, a traffic officer, arrests B for driving at the rate of 20 miles an hour through a town in which the rate of speed is fixed by an ordinance at 15 miles an hour," there is no liability for false imprisonment even if A made the arrest "because B was a personal enemy, or because B had previously reported him for his failure to arrest persons driving at 25 miles an hour." *Id.* § 127, comment a, illustration 1.

2. Common-law courts had compelling reasons for requiring a plaintiff to show probable cause to recover damages for an arrest, no matter how bad the officer's motive. First, courts emphasized the public interest in ensuring that criminals are caught and punished. *Brockway* v. *Crawford*, 3 Jones 433, 437 (N.C. 1856). The probable-cause test promotes this interest by giving officers in the field a clear and

simple standard to gauge whether they can make a given arrest without fear of liability. "By holding [officers] exempt from responsibility for an arrest ... unless the arrest is made ... without probable cause," "the law encourages ... officers, to keep a sharp look-out." *Id.* Thanks to this probable-cause safe harbor, a police officer can do his work without having to "choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967).

Second, common-law courts recognized that the probable-cause element protects officers from improper lawsuits. They appreciated that improper motive is easy to allege, but hard to disprove—particularly because "malice might easily be inferred sometimes from idle and loose declarations." *Chesley* v. *King*, 74 Me. 164, 176 (Me. 1882). Thus, it would not "be wise as a matter of public policy, to throw down the bars which protect public officers from suits for acts done within the scope of their duty and authority, by recognizing the right of every one who chooses to imagine or assert that he is aggrieved by their doings, to make use of an allegation that they were malicious in motive to harass them with suits on that ground." *Id.* at 175–76. In this respect, the probable-cause test served as "a kind of qualified immunity built into the elements of the tort." *Kalina*, 522 U.S. at 133 (Scalia, J., concurring).

Finally, courts addressing malicious prosecution understood that the objective probable-cause element serves as a useful proxy for improper subjective motivation. As this Court said long ago, "it is unquestionably true that want of probable cause is

evidence of malice." *Wheeler*, 24 How. at 550. Put another way, "malice ... may be inferred ... from want of probable cause." *Stewart*, 98 U.S. at 194. The converse is also true: where an officer has probable cause and goes to the trouble of making a custodial arrest, it is likely he does so to enforce the law, not to satisfy a grudge. *Infra* 38; 27–29 (collecting cases with probable cause where juries found no retaliation).

C. The features of retaliatory-arrest cases justify a probable-cause element

In identifying the elements of constitutional torts, this Court has also considered "details specific to" the constitutional claim at issue. *Hartman*, 547 U.S. at 259. Here, too, the distinctive features of retaliatory-arrest cases support a probable-cause element. To see why, consider the three stages of a retaliatory-arrest case: the arrest out in the field, the litigation, and the jury's deliberations. The probable-cause rule solves serious problems that would otherwise arise at each stage.

1. The Arrest. The first distinctive feature of a retaliatory-arrest case is that there are many "wholly legitimate" reasons to consider speech—including constitutionally protected speech—when making arrests. *Reichle*, 566 U.S. at 668. Take first the most obvious example: speech that "provides evidence of a crime." *Id.* Confessions, evasive answers, and implausible excuses are all speech, yet nobody thinks that officers must cast such speech out of their minds when deciding whether to arrest.

Even speech that does not provide evidence of a crime may properly influence a decision to arrest.

There is a "well established tradition of police discretion" over whether and when to perform an arrest; it is, after all, "common sense that *all* police officers must use some discretion in deciding when and where to enforce" the laws. *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 760–71 (2005). Exercising the discretion to arrest often requires thinking about speech. Here are some examples, all drawn from or modeled on real cases:

• *Speech suggesting a risk to the public.* An officer might ordinarily be inclined to cite rather than arrest someone unlawfully driving around the parking lot of a federal building. But when the driver does so on the anniversary of the siege at Waco, with a van painted with slogans such as "Boo ATF" and "Remember the children of Waco!" the officer may instead decide to arrest, fearing another Oklahoma City. *See Kilpatrick*, 432 Fed. App'x at 939.

• *Speech suggesting a danger to the victim.* A member of a protective detail could issue a warning when he sees a man at an event bump into a public official and then immediately apologize. But he might decide to arrest the man if, rather than apologizing, he shouts "Sic Semper Tyrannis!", because the words could lead the officer to perceive a threat to the official's safety. *Cf. Reichle*, 566 U.S. at 660–62.

• *Speech suggesting a danger to the officer.* An officer could at first decide to cite a suspect for violating open-container laws. But when the suspect, whom the officer knows to have become "combative with the police" in the past, starts hurling vulgar

slurs, the officer might change his mind; the suspect's remarks could lead him to fear that the suspect has lost control of his emotions and might take rash action. *See Lawson* v. *Martinez*, 2015 WL 1966069, at *3 (W.D. Tex. Mar. 26, 2015).

• *Speech flaunting criminality.* The Department of Justice may decide to arrest and prosecute those draft dodgers who publicly announce their refusal to register for Selective Service, on the theory that "failing to proceed against publicly known offenders would encourage others to violate the law." *Wayte* v. *United States*, 470 U.S. 598, 613 (1985).

• *Speech suggesting a risk of re-offense.* An officer who breaks up a fight may let some participants off with a warning, but arrest others because they continue to engage in heated argument—speech that leads the officer to expect the fight to resume once he leaves. *Cf. Driscoll* v. *Douglass*, 2013 WL 12075568, at *9–10 (D. Neb. Sep. 9, 2013).

• *Speech suggesting the futility of alternatives to arrest.* An officer who sees a homeless man putting up a tent on private land could think the best course is to make a polite request that the man move. But an officer who sees college students putting up tents on private land, holding signs saying "Property is Theft," could infer that a polite request will not do the trick. *Cf. Dukore* v. *District of Columbia*, 799 F.3d 1137, 1139 (D.C. Cir. 2015).

A probable-cause element allows officers to make all of these indisputably valid arrests without fear of liability. The element provides a safe harbor; so long as there is probable cause, the officer need not worry

about being sued or held liable even though his consideration of speech is (in *Reichle*'s words) "wholly legitimate."

There is no workable alternative. One cannot forbid officers from considering protected speech when making arrests; as the examples above demonstrate, the categories of unprotected speech—libel, obscenity, fighting words, true threats, and the like—simply do not map on to the legitimate grounds for considering speech when making arrests. Nor would it be feasible to develop a new taxonomy of legitimate and illegitimate ways to use speech. Lawyers might love the "highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions" that would characterize that new branch of First Amendment jurisprudence, but that new taxonomy would be "literally impossible of application by the officer in the field." *New York* v. *Belton*, 453 U.S. 454, 458 (1981).

Nor would a prohibition on "animus" or "hostility" toward speech fare any better. "Animus" is hardly self-defining, and the line between legitimate contemplation of speech and illegitimate animus toward speech is hardly clear. Moreover, an officer "herself often will not know whether an illicit reason tainted her [decision], given the complex dynamic between legitimate assessments of harm and illegitimate attitudes toward opinions." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 440 (1996).

Indeed, in each of the examples above, animus toward the speech could easily be alleged as the source of the officer's decision. That problem is most obvious where the speaker directly addresses the officer; an officer who hears a combative suspect hurl a vulgar epithet would rightly worry whether others might think he acted because he felt insulted and not because he feared the situation was escalating out of control. But the same problem arises in the other examples. The officer who arrests the van driver might disagree with the driver's criticism of the government's actions at Waco. Should she really have to stop and ponder whether she is thinking—and whether a *jury* would think she is thinking—about the suspect's speech in a legitimate way (addressing a potential threat) or an illegitimate way (retaliating against a controversial idea)?

2. The Litigation. The second stage of a retaliation case—the litigation—brings to the fore a second distinctive feature of retaliatory-arrest cases: the difficulty of resolving them before trial. Motive-driven claims are already difficult to resolve at the pleading and summary-judgment stages; "the allegation of malicious or corrupt motives could always be made, and, if the motives could be inquired into [officers] would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence." *Spalding* v. *Vilas*, 161 U.S. 483, 494 (1896). These problems only become more acute in retaliatory-arrest cases.

For one thing, it is easy to accuse an officer of making an arrest because of speech. Any time the arrestee happens to be sporting a "Make America Great Again" hat, displaying a "Black Lives Matter"

bumper sticker, or even holding a camera, he could allege that the officer singled him out because of his expression. Similarly, the typical arrest involves some verbal exchange between the suspect and the officer, so it is easy to allege that it was something the suspect said, not (or not just) what he did, that led the officer to take him into custody—particularly for those who exercise their First Amendment right to sling abuse, invective, and profanity at police officers. *See Lewis* v. *New Orleans*, 415 U.S. 130, 133 (1974). And as discussed earlier, the First Amendment often *allows* officers to think about speech when making arrests; in each such case, the suspect could allege that the officer acted because of hostility to his speech, not because of the information it revealed.

For another thing, arrests are highly charged encounters, and the participants are apt to come away with different stories. The suspect may sincerely believe that the officer arrested him because of hostility to speech, but the officer may feel just as strongly that he evenhandedly enforced the law. These conflicting stories will make it uniquely difficult to resolve retaliatory-arrest claims at summary judgment if the inquiry turns entirely on the officer's state of mind.

Retaliatory-arrest cases thus pose a unique threat to the "strong public interest in protecting public officials from the costs associated with the defense of damages actions." *Crawford-El* v. *Britton*, 523 U.S. 574, 590 (1998). "It cannot be disputed seriously that [such] claims run frequently against the innocent as well as the guilty." *Harlow* v. *Fitzgerald*, 457 U.S.

800, 814 (1982). These meritless claims impose serious costs on both "the defendant officials" and "society as a whole": they deter "able citizens from acceptance of public office," and they consume the time and attention of those who fill these offices, frustrating their ability to "unflinching[ly] discharge ... their duties." *Id.*

A probable-cause element addresses these problems by allowing "insubstantial lawsuits" to be "quickly terminated." *Crawford-El*, 523 U.S. at 590. When "there is no dispute of fact, the question of probable cause is a question of law, for the determination of the court." *Crescent City*, 120 U.S. at 149. A probable-cause element thus weeds out claims at the motion-to-dismiss and (more often) summary-judgment stages. If the facts are not in dispute, or the facts in the plaintiff's own pleadings or affidavits show probable cause, the court could dismiss the lawsuit without trial and with (at most) limited discovery.

Better still, the probable-cause element achieves these goals in a principled way. This Court has rightly disclaimed the power to throw up newfangled obstacles without "precedential grounding" or "common-law pedigree" simply to protect defendants from § 1983 claims. *Crawford-El*, 523 U.S. at 594–95. The probable-cause element, however, has both grounding and pedigree: *Hartman* endorsed it for retaliatory-prosecution claims, and the common law has long required it for malicious-prosecution and false-imprisonment claims.

By contrast, eliminating the probable-cause element guarantees that many meritless claims will go

to trial. The experience of the Ninth Circuit—which has definitively rejected a probable-cause element in retaliatory-arrest cases—proves as much.

• *Ballentine* v. *Las Vegas Metropolitan Police Department*, 2017 WL 3610609 (D. Nev. Aug. 21, 2017). The Sunset Activist Collective regularly chalked Las Vegas sidewalks, often with anti-police messages such as "f— the cops" and "f— pigs." *Id.* at *1, 4. They never cleaned up their graffiti, leaving Las Vegas to do so.

Eventually, the city complained to the police department about the mounting costs—on one occasion, over a thousand dollars. *Id.* at *1, 3. So the police warned the chalkers that their actions violated state law, encouraged them to protest by holding up signs instead, and asked them to at least clean up their graffiti once finished, all to no avail. *Id.* at *3. After several more incidents, an officer got a warrant and arrested the chalkers for defacing public property. *Id.* at *4.

The district court ruled that the chalkers' retaliation case had to go to trial. One of the officers was aware of the chalkers' association with anti-police groups, had identified the content of their graffiti when seeking an arrest warrant, and had once disputed the accuracy of the chalkers' message *without even asking them to stop chalking*. From this, the court said, a jury could infer that the officer "intended to chill the plaintiffs' anti-police messages." *Id.* at *6.

• *Holland* v. *City of San Francisco*, 2013 WL 968295 (N.D. Cal. Mar. 12, 2013). As police were arresting one protester, a different one yelled "Free

her!", persistently questioned the arrest, and repeatedly disobeyed lawful orders to stand away from the arrest. *Id.* at *5. Then, she either (on the police's view) assaulted or (on her view) accidentally bumped into an officer, prompting the police to arrest her. *Id.* at *1.

The court concluded that the officers had probable cause but nonetheless had to face trial, because one could infer that the protester "would not have been arrested" but for "her persistent questioning of the officers and verbal challenges to their authority." *Id.* at *3, *5. After a five-day jury trial held three years after the protester filed her complaint, the jury found that the defendants had not "retaliated against her in violation of her First Amendment rights." ECF 168, No. 10-cv-2603.

• *Mam* v. *City of Fullerton*, 2013 WL 951401 (C.D. Cal. 2013). An officer arrested the plaintiff after he repeatedly disobeyed orders to back up while police attempted to break up a fight. The district court held that the officer had probable cause to arrest him for willful obstruction of a peace officer. *Id.* at *3–4. It nonetheless denied summary judgment as to the plaintiff's retaliatory-arrest claim: because the plaintiff was the only person known to be recording the fight, because he was the only person they arrested, and because the officer arrested him using a "leg sweep," a jury could find that the officer decided to arrest the plaintiff because he was exercising his First Amendment right to record them. *Id.* at *5.

After an eight-day trial, the jury concluded that the officer had not retaliated against the plaintiff.

The case was not "close"—"the jury spent only approximately two hours deliberating before reaching a unanimous verdict." 2014 WL 12573550, at *3 (C.D. Cal. July 24, 2014).

• *Morse* v. *San Francisco Bay Area Rapid Transit District*, 2014 WL 572352 (N.D. Cal. Feb. 11, 2014). The plaintiff, an online journalist, had a long history of criticizing and attending protests of the local transit system. *Id.* at *1. Before one protest, officers circulated a flyer with the plaintiff's and a protest organizer's pictures, because "it was more likely than not that the protest would occur where they showed up." *Id.* at *4. During the protest, the plaintiff joined others in blocking fare gates. *Id.* at *14. Police arrested him because he was an "active participant," "marching ... around the ticket vendors, blocking fare gates, [and] impeding the flow of patrons." *Id.* at *6.

The district court held that the arrest was supported by probable cause, but sent his retaliation claim to the jury: The plaintiff had published stories critical of transit-system officials, he claimed to have been treated differently than others at the protest, and the police informed the media after the protest that no "legitimate" member of the press had been arrested. *See id.* at *9–11. After a four-day trial, the jury found that the plaintiff's speech "was [not] a 'but for' cause" of his arrest. ECF 119, No. 12-cv-05289.

• *Eberhard* v. *California Highway Patrol*, 2015 WL 6871750 (N.D. Cal. Nov. 9, 2015). The plaintiff covered a controversial construction project for a local newspaper. During a protest, police arrested him

for trespass because he was in an area of the site "fenced off from the public" and "marked off by no-trespassing signs," and he lacked the escort that he needed to be at the site. *Id.* at *4.

The court nonetheless allowed his retaliation claim to go to the jury, because he alleged (among other things) that the officers knew he was a journalist, knew he was onsite to cover the protest, knew he had criticized the Highway Patrol, and had made comments about prior incidents between the plaintiff and the police. *See id.* at *7. Two years after the plaintiff filed his complaint, the jury unanimously determined that the officer had not "violated [Eberhard's] First Amendment rights." ECF 275, No. 14-cv-1910.

• *Mihailovici* v. *Snyder*, 2017 WL 1508180 (D. Or. Apr. 25, 2017). After being *convicted* of a crime, the plaintiff sued over the underlying arrest. On the arresting officer's version of events, the plaintiff pulled up behind her during an ongoing traffic stop, aggressively approached her, and then refused to take his hands out of his pocket and to stop reaching for his fanny pack. She arrested him for interfering with a peace officer by disobeying orders. On the plaintiff's version of events, the arresting officer's chief ordered her to arrest him for complaining about police conduct.

The plaintiff sued the police chief for retaliatory arrest. Despite conclusive evidence of probable cause—again, a jury *convicted* the plaintiff—the court held that the retaliation claim "survive[d] summary judgment on the merits": The plaintiff

claimed that the police chief was hostile on a previous occasion when they spoke about police conduct. And he claimed that the police chief told the arresting officer to arrest him after he mentioned filing a complaint. *See id.* at *6. The only thing that spared the police chief from trial was timing; because the arrest occurred before the Ninth Circuit had conclusively eliminated the probable-cause element, the chief won qualified immunity. *See id.* at *6–*7.

These problems have been so serious that the Ninth Circuit has tried to contain them by rewriting the rules of summary judgment. Even though there is "almost always a weak inference of retaliation whenever a plaintiff and a defendant have had previous negative interactions," the Ninth Circuit has advised courts to overlook that inference where evidence of probable cause is "strong" and evidence of retaliatory motive is "weak"; otherwise, "nearly every retaliatory First Amendment claim would survive summary judgment," and officers would not be "protect[ed] ... from the disruption caused by unfounded claims." *Dietrich* v. *John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008). That, of course, is an unprincipled answer; the summary-judgment standard does not vary depending on the nature of the case. The very reality that the Ninth Circuit has felt the need to adjust Rule 56 to mitigate the effects of its rule shows that the rule is unsound to begin with. In any event, this procedural fudge has failed to solve the problem; as the examples just recounted show, officers continue to face trials over plainly proper arrests, in part because judges often disagree about what the undisputed facts reveal about the officer's intent. *See e.g.*, *Maidhof* v. *Celaya*, 641 Fed.

App'x 734 (9th Cir. 2016); *White* v. *County of San Bernardino*, 503 Fed. App'x 551 (9th Cir. 2013).

3. The Deliberations. The final phase of a retaliation case—the jury's deliberations—further suggests the need for a probable-cause element. In "any sort of retaliation action," the jury must decide both whether the defendant had a retaliatory motive and whether there is "a causal connection" between that motive and the later harm. *Hartman*, 547 U.S. at 259. "Our trial processes," however, "are clumsy and unsatisfying for inferring cogitations which are incidental to actions." *American Communications Association* v. *Douds*, 339 U.S. 382, 437 (1950) (Jackson, J., concurring in part and dissenting in part). Even under the best conditions, it can be hard for the fact-finder to figure out what the defendant was thinking and to decide whether he would have done the same thing had he been thinking something else.

Hartman explained that this task becomes even more difficult in a retaliatory-prosecution case, where "the requisite causation ... is usually more complex than it is in other retaliation cases." 547 U.S. at 261. In such a case, the defendant is an official who induced the prosecutor to file charges; the defendant is not the prosecutor himself, since prosecutors enjoy absolute immunity. The jury must therefore find a causal link "between the retaliatory animus of one person" (the official) "and the action of another" (the prosecutor). *Id.* at 262.

Retaliatory-arrest cases, too, present evidentiary complications. In the first place, assessing officers' motives is tricky. Officers face "kaleidoscopic situation[s]," "where spontaneity rather than adherence

to a police manual is necessarily the order of the day." *Quarles*, 467 U.S. at 656. "Undoubtedly most police officers, if placed in [those situations], would act out of a host of different, instinctive, and largely unverifiable motives." *Id.* This Court has accordingly recognized that simply "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Leon*, 468 U.S. at 922 n.23.

Moreover, "retaliatory-arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." *Reichle*, 566 U.S. at 668. Indeed, they raise an even greater challenge than the average prosecution case: distinguishing decisions caused by *legitimate* consideration of speech and decisions caused by *illegitimate* consideration of speech. To recycle an example, suppose a suspect known for confrontational behavior suddenly starts yelling obscenities at the officer questioning him—leading the officer to feel insulted, but also to worry that the suspect may attack him. The officer makes an arrest. How is the jury supposed to decide whether the but-for cause of the speech was the officer's (legitimate) inference that the suspect posed a risk to his safety, or instead the officer's (illegitimate) affront at being insulted?

In addition to this fundamental difficulty, many arrest cases present the same complexity as prosecution cases: a multiplicity of participants, and a resulting need to "divin[e] the influence" of one mind upon another. *Hartman*, 547 U.S. at 263. Consider any retaliation case involving an arrest warrant.

The factfinder would have to decide whether the officer's improper motive influenced the neutral and detached magistrate—the same kind of complex causal inquiry that arises in prosecution cases. Or consider a case (like this one) in which one official or officer is alleged to have induced an officer to make the arrest. Where the spite lies in the heart of one officer but the handcuffs come from the belt of another, the factfinder will have to uncover a causal link between the motives of the former and the actions of the latter—again, the same kind of complication that arises in retaliatory-prosecution cases.

A probable-cause element solves all of these problems. As in retaliatory-prosecution cases, "evidence of the presence or absence of probable cause ... will be available in virtually every retaliatory arrest case." *Reichle*, 566 U.S. at 668. And, as in retaliatory-prosecution cases, this "highly valuable circumstantial evidence" will help simplify the causation inquiry. *Hartman*, 547 U.S. at 261. In particular, the probable-cause element helps distinguish arrests that rest on no consideration of speech at all, or on legitimate consideration of speech, from truly retaliatory ones. The presence of probable cause suggests that the officer made the arrest because the suspect may have committed a crime; the absence of probable cause suggests that the officer made the arrest because he disliked something the suspect said. The probable-cause element also helps bridge the causal gap in multiple-actor cases; here, the presence of probable cause suggests that Officer Aguirre arrested Lozman because he formed an independent judgment Lozman was violating the law, not because he was following retaliatory orders.

To be sure, *Hartman* recognized that probable cause "does not guarantee" that the challenged action is non-retaliatory. *Id.* at 265. *Hartman* also recognized, however, that this reality does not eliminate the need for a categorical rule. *See id.* at 264 n.10. The advantages of *Hartman*'s categorical approach are familiar. Like other bright lines, it promotes simplicity, provides predictability, and ensures that similar cases come out similarly. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). These advantages are particularly important in retaliatory-arrest cases, since arrests are far more common and far more pertinent to day-to-day policing than inducements to prosecute.

D. A probable-cause element is consistent with the values of the First Amendment

Finally, the Court considers "the values and purposes of the constitutional right at issue" when identifying the elements of a constitutional tort. *Manuel*, 137 S. Ct. at 921. The probable-cause element is consistent with the values and purposes of the First Amendment.

1. *Hartman* establishes that a probable-cause element comports with the values of the First Amendment. In that case, recall, postal inspectors "engineered [a] criminal prosecution" in retaliation for Moore's "lobbying Members of Congress, testifying before congressional committees, and supporting a 'Buy American' rider to the Postal Service's 1985 appropriations bill." 547 U.S. at 253–54. Even though the First Amendment generally prohibits retaliation for protected speech, and even though Moore's

speech fell within the heartland of the First Amendment, Moore could not prevail without proving probable cause. *Id.* at 265–66.

If the probable-cause element in *Hartman* comports with the values of the First Amendment, then so does the probable-cause element here. A criminal prosecution is a far greater intrusion on a defendant's liberty than an arrest. And a criminal investigator's calculated decision to engineer such a prosecution in retaliation for speech is far more blameworthy than a police officer's spur-of-the-moment decision to arrest. It would be anomalous to insist that the First Amendment requires *more* protection in the latter setting than in the former.

2. A probable-cause element also fits with this Court's preference for objective First Amendment tests. This Court's First Amendment cases generally use objective rules to judge the legality of government action. Indeed, "it is a familiar principle" of First Amendment law that a "wrongful purpose or motive" cannot invalidate "an otherwise constitutional" act. *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968). This general approach lines up with the First Amendment's text; in prohibiting laws that abridge the freedom of speech, the First Amendment "does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and concurring in the judgment). This objective approach also accords with the original meaning of the First Amendment; judicial decisions "from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of

lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray* v. *United States*, 195 U.S. 27, 56 (1904).

This Court's retaliation cases, which do ask about motive, are an exception to these rules. Yet even in this setting, "the motive-is-all test is not the law." *Wilkie* v. *Robbins*, 551 U.S. 537, 558 n.10 (2007). To the contrary, this Court's retaliation cases use objective tests to guide the motive inquiry. Most obviously, as just discussed, a criminal defendant claiming retaliatory prosecution must show more than improper motive; he must also show the lack of probable cause. *Hartman*, 547 U.S. at 252. A public employee claiming retaliatory firing must show more than improper motive; he must also show that his speech involved a matter of public concern and that he uttered it as a citizen rather than as a public servant. *Connick* v. *Myers*, 461 U.S. 138, 146 (1983); *Garcetti* v. *Ceballos*, 547 U.S. 410, 421 (2006).

The justifications for these objective tests apply with full force here. Objective elements help courts avoid the "complication of [assessing] motive." *Wilkie*, 551 U.S. at 558 n.10. To the extent motive matters, "objective tests and rules" serve as useful proxies. Kagan, *Private Speech, Public Purpose*, 63 U. Chi. L. Rev. at 441. They allow courts to perform a "rough sorting" between tainted and untainted actions, without tangling themselves in the evidentiary problems raised by "a direct inquiry into motive." *Id.* The probable-cause element likewise separates properly from improperly motivated arrests; the lack of an objective justification for the arrest suggests that the arrest may have resulted from an improper motive. The proxy is of course imperfect,

but no more so than other "overinclusive and underinclusive categorical rules" deployed to "discover impermissible purpose" in First Amendment cases. *Id.* at 472. Moreover, there is no reason to think that this proxy will do a worse job at detecting and punishing improper arrests than a purely subjective test, which (because of the difficulties of assessing police intentions) will almost always leave jurors to speculate about the arresting officer's "real" motive.

Further, objective tests promote compliance in a way that a subjective inquiry into motive does not. It is "easier" for government officials "to follow rules relating to [the objective features of their acts] than to follow a command not to consider illicit factors"; after all, it is usually easier to follow directives about what not to do than to follow directives about what not to think. *Id.* at 441 n.81. Accordingly, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton* v. *California*, 496 U.S. 128, 138 (1990). A prohibition upon arrests unsupported by probable cause will yield compliance; a prohibition upon arrests that rest on impure thoughts will yield only confusion.

3. Separately, this Court's First Amendment cases calibrate doctrinal tests to reflect the real-world risk of improper government action—applying "more stringent" tests to actions that "carry greater risks of censorship," *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 764 (1994), but giving governments more leeway where there is "no realistic possibility that official suppression of ideas is afoot," *R.A.V.* v. *St. Paul*, 505 U.S. 377, 390 (1992). The

probable-cause element is consistent with this principle.

The arrests that are most likely to rest on improper motives are arrests unsupported by probable cause. As discussed above, the very absence of probable cause suggests that an improper motive may have tainted the arrest. The probable-cause element allows courts to continue holding officers responsible for such arrests.

By contrast, arrests backed by probable cause pose little danger to the freedom of speech. To begin with, an officer has probable cause only if "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief" that the suspect has committed a crime. *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996). That is a meaningful constraint; probable cause is more than reasonable suspicion, and it is certainly more than a hunch. This limit on the scope of the arrest power *already* checks efforts to take speakers into custody purely on account of disagreement with their views; it ensures that an officer cannot go around arresting anybody and everybody with whom he disagrees.

In addition, probable cause turns on "the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004). This temporal requirement further reduces the risk that police will use probable-cause-backed arrests to censor speech. It will be the unusual case where the officer both notices someone expressing views with which he disagrees and simultaneously knows facts that establish probable cause to believe that the

speaker has committed a crime. And even if he does, it will be rarer still for the officer to have the desire and ability to act on that serendipitous confluence by making an arrest. *Infra* 47–48.

4. The probable-cause element also affirmatively promotes the freedom of speech by enabling officers to make arrests that facilitate speech.

Officers must often police events that juxtapose passionate people with contradictory views: the college lecture that pits the controversial conservative speaker against the agitated progressive activists; the rally that pits the neo-Nazi protesters against the anti-fascist counter-protesters; or the city council meeting at which two sides of a hotly disputed local issue wish to be heard. In these settings, "the choice is not between order and liberty," "it is between liberty with order and anarchy without either." *Terminiello* v. *Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). If the police fail to enforce the law and to prevent disorder and violence at these highly charged events, *nobody* would get a chance to speak, and hecklers could use violence and threats to veto speech they oppose. The probable-cause element encourages officers to enforce the law at such gatherings. The lack of such an element, by contrast, would discourage officers from doing their duty, since it would be all too easy for the arrested lawbreaker to claim that the *real* reason for the arrest was his speech rather than his crime.

5. The provision of the Constitution most closely related to retaliatory arrests reinforces this assessment of the values underlying the First Amendment.

The Arrest Clause states that all "Senators and Representatives" are generally "privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same." U.S. Const. art. I, § 6, cl. 1.

The Arrest Clause exists to protect legislators from retaliatory arrests. "It might otherwise happen, that [a senator or representative] might be arrested from mere malice, or political persecution, and thus [his constituents] might be deprived of his aid and talents during the whole session." Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 143, p. 94 (1840). This privilege helps "secure independence, firmness, and fearlessness on the part of the members," *id.* § 144, p. 94, in the same way that retaliation doctrine helps secure those same attributes for other speakers.

Despite the obvious need to protect legislators against retaliatory arrests, however, the Arrest Clause cabins their immunity: it applies to "all Cases, *except* Treason, Felony and Breach of the Peace." U.S. Const. art. I, § 6, cl. 1 (emphasis added). This "compendious" exception encompasses "all criminal cases of every description," leaving the privilege to cover (now-obsolete) arrests in civil lawsuits. *Williamson* v. *United States*, 207 U.S. 425, 446 (1908); *see Long* v. *Ansell*, 293 U.S. 76, 83 (1934). In other words, the Constitution protects legislators from retaliation for their speech by immunizing them from arrests, but lifts that immunity where there is probable cause to believe that the legislator has committed a criminal offense, no matter how minor. The Arrest Clause thus embodies a judgment

about the relative importance of preventing politically motivated arrests and preventing crimes. Just as a valid criminal charge, supported by probable cause, justifies withholding an *immunity* designed to prevent retaliatory arrests, so too a valid criminal charge, supported by probable cause, justifies withholding a *damages remedy* designed to deter retaliatory arrests.

II. Criticisms of the Probable-Cause Element Lack Merit

Lozman criticizes the probable-cause element on doctrinal, practical, and procedural grounds. Each criticism is misplaced.

A. Lozman's doctrinal criticisms of the probable-cause element are wrong

1. Lozman first appeals to the framework for First Amendment retaliation cases established in *Mt. Healthy*. Under that framework, a plaintiff must prove that he engaged in constitutionally protected speech and that this speech was a substantial factor in motivating the challenged action. If he can do so, the government is liable unless it can show that it would have reached the same decision even in the absence of the protected speech. 429 U.S. at 287.

This Court developed the *Mt. Healthy* test to deal with retaliation claims brought by "government employee[s]." *Id.* at 283. The Court has extended the framework to similar claims by "independent contractors," *Board of County Commissioners* v. *Umbehr*, 518 U.S. 668, 677–78 (1996), and, in a plurality opinion, to the removal of a book from a school library, *Board of Education* v. *Pico*, 457 U.S. 853 (1982). The Court has never held that *Mt. Healthy*

establishes a general framework for all First Amendment retaliation claims. In any event, the test is a poor fit for arrest cases, for three reasons.

First, it works badly in the field because it fails to account for the legitimate consideration of speech when making an arrest; an arrestee's speech might even legitimately cause an officer to make an arrest he would not otherwise have made. *Supra* 19–21. Lozman initially suggests that these legitimate considerations should be assessed at *Mt. Healthy*'s first step, which asks whether the speech is "protected." (Brief 33.) But this prong is not up to the task. For instance, the First Amendment protects both confessions and threatening language that falls short of a true threat. *Simon & Schuster, Inc.* v. *Crime Victims Board*, 502 U.S. 105, 123 (1991); *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (*per curiam*). Nobody thinks that arresting officers must cast out of their minds all confessions and threatening language that falls short of a true threat. As a result, Lozman cannot rely on the line between protected and unprotected speech to exempt obviously lawful police conduct from *Mt. Healthy*'s rule.

Lozman alternatively suggests handling the legitimate consideration of speech at *Mt. Healthy*'s second step, which concerns the defendant's state of mind. (Brief 34). *Mt. Healthy* itself asks whether the plaintiff's protected "conduct" motivated the decision, 429 U.S. at 287; Lozman tweaks this prong to ask whether the defendant's "animus" toward that conduct motivated the decision (Brief 33). But this approach is unworkable. Again, animus is not self-defining. It is difficult for an officer to psychoanalyze himself to decide whether he is considering speech

in a good way or a bad one. And it is even more difficult for a court to do so after the fact. *Supra* 22–32.

Second, the *Mt. Healthy* framework fails to protect police officers from the burdens of discovery and trial on insubstantial allegations. When state of mind is at issue, there will almost *always* be a factual dispute incapable of resolution on the papers. The cases from the Ninth Circuit, discussed above, illustrate the point. In *Holland*, for example, did the officer *really* arrest the protester for stepping into the street repeatedly? Or did he do it because the protester had been exercising her First Amendment right to criticize police? In *Mam*, did the officer *really* arrest the plaintiff for interfering with an arrest? Or did he do so based on the fact that the man in question was recording him? There is no definitive proof either way, which is why both cases proceeded beyond summary judgment. *Holland*, 2013 WL 968295 at *5–*6; *Mam*, 2013 WL 951401 at *5. So it will be in just about every case governed by *Mt. Healthy*.

Third, the *Mt. Healthy* framework produces less accurate, less reliable verdicts in arrest cases. A typical *Mt. Healthy* case involves a long-term relationship between an employee and his employer, one giving rise to considerable evidence of intent—including a paper trail (performance evaluations, disciplinary reports) and obvious comparisons (the employer's treatment of others, the employer's treatment of the employee before the speech in question). The typical arrest, however, is a one-off, highly charged encounter; there often is no preexisting relationship between the parties, no neutral record of

what the parties were thinking, and no set of similarly situated suspects for ready comparison. Because drawing reliable inferences of motive and causation is much harder in arrest cases, a probable-cause element is necessary, lest jurors be left to decide which arrests violate the Constitution based on speculation alone.

2. While Lozman attempts to expand *Mt. Healthy* beyond employment and independent contracting, he tries to limit *Hartman* to the "exercise of prosecutorial power." (Brief 40). Lozman asserts that prosecution cases raise "unique concerns." (Brief 39, 40.) But arrest cases raise some of the same concerns, plus a few new concerns of their own—the range of legitimate reasons to consider speech, the need for clear rules, the considerable risk of prolonged, intrusive discovery, and so forth. *Supra* 19–34. The distinctive features of arrest cases justify a probable-cause element in the retaliatory-arrest context, just as the features of prosecutions require the same element in the retaliatory-prosecution context.

Lozman is also wrong to argue that *Hartman* turned on difficulties created by prosecutors' absolute immunity. Instead, *Hartman* grounded its probable-cause element in the general difficulty of "prov[ing] a chain of causation from animus to injury" in retaliatory-prosecution cases. 547 U.S. at 259. That general difficulty arises in arrest cases as well—which "also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury," *Reichle*, 566 U.S. at 668—even if it stems from officers' legitimate need to consider speech in some instances rather than prosecutors'

intervening charging decisions. In fact, probable cause does as good a job separating wheat from chaff in the arrest context as in the prosecution context. That much is illustrated by the Ninth Circuit cases discussed above, in which defendant officers prevailed at trial after district courts allowed retaliation claims to go to the jury. *Supra* 27–29.

3. Lozman persists that because the First and Fourth Amendments are distinct, the Court must use different tests to determine compliance with the two. (Brief 27–29.) That is not so. First Amendment rules often overlap with, or add nothing to, protections provided by other constitutional provisions. *See, e.g.*, *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 565 (1978) (First Amendment does not require courts to go beyond the requirements of the Warrant Clause when authorizing searches of newspapers' offices); *Eldred* v. *Ashcroft*, 537 U.S. 186, 221 (2003) (First Amendment generally does not add to the "built-in free speech safeguards" already present in copyright law); *Calder* v. *Jones*, 465 U.S. 783, 790 (1984) (same test governs personal jurisdiction in speech and non-speech cases because the "infusion" of "First Amendment concerns" "would needlessly complicate an already imprecise inquiry"); *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 393 (2011) (same test governs public employees' speech and petition claims because separate tests "would add to the complexity and expense of compliance with the Constitution"). And even though the probable-cause element makes retaliatory-arrest claims similar to Fourth Amendment wrongful-arrest claims, that does not make the First Amendment irrelevant; it will surely be easier, for example, to secure punitive

damages where the officer acted out of retaliatory spite rather than innocent carelessness.

4. Last, Lozman claims that, because probable cause does not defeat an equal-protection claim, it should not defeat a First Amendment claim either. (Brief 30.) That does not follow. First, equal-protection selective-enforcement claims come with their own objective safeguards; a plaintiff bringing such a claim must, in addition to showing "discriminatory purpose," also show a "discriminatory effect" by identifying "similarly situated individuals of a different race" against whom the government did not enforce the law. *Armstrong*, 517 U.S. at 465. This objective "effect" element performs the same kind of screening function there that the objective probable-cause element performs here. Second, the features of speech cases differ from those of arrest cases. There are many legitimate reasons to consider speech when making an arrest, but almost none to consider race or other protected characteristics. *See Whren*, 517 U.S. at 813. Finally, the values underlying equal protection differ from the values underlying freedom of speech. Motive is central to the Equal Protection Clause in a way that it is not central to the Free Speech Clause; the *sine qua non* of an equal-protection violation is "purposeful discrimination." *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 274 (1979).

B. Lozman's practical criticisms of the probable-cause element are wrong

1. Lozman next warns of the danger that the government will exploit its arrest power to suppress speech. But to the extent such a risk exists, it arises

most acutely with respect to arrests without probable cause, not with respect to arrests supported by probable cause.

Lozman struggles to show a danger to free speech. First, he hypothesizes that a city could "adopt a formal policy directing its police department to enforce a jaywalking statute against only those jaywalkers who are engaged in particular First Amendment-protected expression—say, wearing Black Lives Matter t-shirts or Make America Great Again hats." (Brief 26.) Lozman identifies no real-world example of any such ordinance, and no reason to think that any city would ever enact one. If any city *did* adopt such an ordinance, a court could certainly enjoin it, regardless of whether probable cause is an element of a retaliatory-arrest claim. Separate First Amendment rules prohibit content-based and viewpoint-based laws; those objective First Amendment tests, unlike the motive-centered retaliation doctrine at issue in this case, do not have a separate probable-cause element.

Second, Lozman posits that an officer could always assert probable cause for *some* crime, because "virtually every citizen has violated *some* law" during his life. (Brief 22.) But probable cause turns on "the facts known to the arresting officer *at the time of the arrest*." *Devenpeck*, 543 U.S. at 152 (emphasis added). This is an important limitation: rarely is an officer who harbors some ill will towards a speaker present at the exact moment the speaker does something that gives probable cause for an arrest.

Third, Lozman claims that arrests for minor offenses pose risks to the freedom of speech. That is

not so. There are numerous barriers to the kinds of arrests that Lozman fears. "Many jurisdictions ... have chosen to impose more restrictive safeguards [than the Constitution requires] through statutes limiting warrantless arrests for minor offenses." *Atwater*, 532 U.S. at 352 (collecting examples). In addition, police departments have their own incentives to "limit petty-offense arrests," which "carry costs that are simply too great to incur without good reason." *Id.* For instance, the officer must take the arrested individual to the police station, forcing him to spend "time away from active patrol." Brief of Texas 10, *Atwater* v. *City of Lago Vista*, No. 99-1408. Once at the station, the officer must "complete extensive paperwork." *Id.* at 11. Further, "every detainee must be booked, searched, photographed, and fingerprinted," with yet more "extensive paperwork" to be completed. Brief of Institute for Criminal Justice 12, *Atwater* v. *City of Lago Vista*, No. 99-1408. Moreover, for those who remain beyond booking, "a magistrate [must] review the case and make bonding and other release decisions," and in "most jurisdictions, a pretrial service officer will also be involved at this early stage." *Id.* at 15.

These considerable costs, "combined with the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials," mitigate the risk that police departments in general—or even rogue officers in particular—will use minor-offense arrests backed by probable cause to suppress speech. *Atwater*, 532 U.S. at 353. In fact, the Court has *already* concluded that there is no "epidemic of unnecessary minor-offense arrests." *Id.* If

there aren't many troubling minor-offense arrests *period*, there surely aren't many retaliatory ones.

Finally, Lozman worries about arrests under laws that "are so broad" that they "potentially support probable cause in a wide variety of circumstances." (Brief 23.) But this Court has already identified the appropriate antidote to such laws: the vagueness doctrine. This doctrine already prohibits laws that are so standardless that they encourage "arbitrary and discriminatory enforcement." *Papachristou* v. *Jacksonville*, 405 U.S. 156, 170 (1972). And the doctrine applies with added rigor to laws that have the "potential for arbitrarily suppressing First Amendment liberties." *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983). Vagueness doctrine targets the problems raised by unduly expansive criminal laws; by contrast, retaliatory-arrest doctrine sweeps far more broadly than the problem Lozman wants it to solve, since it would allow a plaintiff to bring a retaliatory-arrest claim regardless of the breadth or specificity of the offense justifying the arrest.

2. Some amici supporting Lozman try to support his theoretical concerns with real examples. The examples on which they rely do not advance their case.

Those that most trouble amici all involve arrests unsupported by probable cause; they thus reinforce that it is only those arrests, rather than arrests backed by probable cause, that raise any serious risk to freedom of speech. Thus, one amicus discusses Sheriff Joe Arpaio's practice of arresting journalists *without* probable cause. *Lacey* v. *Maricopa County*, 693 F.3d 896, 919, 922–23 (9th Cir. 2012) (discussed

in Brief of National Press Photographers Association 9–10). Another discusses cases where the plaintiffs allegedly did nothing more than question a neighbor's arrest, Brief of MacArthur Justice Center 8, or peacefully protest in a public forum, *id.* at 4—again, cases where there is no probable cause for any crime. Yet another amicus discusses a case where the court held that the police lacked probable cause to arrest if, as the plaintiff alleged, he was doing nothing more than standing near a political sign. *Gullick* v. *Ott*, 517 F. Supp. 2d 1063, 1074–75 (W.D. Wis. 2007) (cited in Brief of Institute for Free Speech 10–12).

Next, a wide range of the examples come from opinions that rule on dispositive motions and that therefore *assume* the truth of the plaintiffs' version of the story. *See, e.g.*, *Roper* v. *City of New York*, 2017 WL 2483813, at *1 (S.D.N.Y. June 7, 2017); *Fernandes* v. *Jersey City*, 2017 WL 2799698, at *1 (D.N.J. June 27, 2017); *Marlin* v. *City of New York*, 2016 WL 4939371, at *1 (S.D.N.Y. Sep. 7, 2016); *Laning* v. *Doyle*, 2015 WL 710427, at *19 (S.D. Ohio Feb. 18, 2015); *Morse*, 2014 WL 572352, at *8; *Baldauf* v. *Davidson*, 2007 WL 2156065, at *1 (S.D. Ind. July 24, 2007). Needless to say, not all of these allegations are true. In one example, the case went to trial and the jury found the arrest *not* to be retaliatory. *See* Jury Verdict, *Morse* v. *San Francisco Bay Area Rapid Transit District*, No. 12-cv-5289 (Sept. 29, 2014) (ECF No. 119). And in other cases, the allegations are simply hard to credit. For example, the plaintiff in *Laning*, who concededly "failed to stop immediately after [an officer] activated the lights on his cruiser," alleged that she was in truth arrested

for later asking the officer, one time, why she was being detained. 2015 WL 710427, at *1, 7, 15.

The remaining examples involve arrests that appear to have been appropriate. For instance, in one case, officers arrested protesters who obstructed traffic on a busy road. Brief of MacArthur Justice Center 13–14. In another, officers arrested man who entered a government trailer at the site of a bridge collapse, "became confrontational and argumentative," and "was repeatedly asked to leave." *Galarnyk* v. *Fraser*, 687 F.3d 1070, 1072 (8th Cir. 2012) (discussed in Brief of First Amendment Foundation at 16–17). The plaintiff there claimed that police arrested him only because he had given televised interviews discussing the cause of the bridge collapse, but it is hard to believe the police would have otherwise overlooked a "confrontational and argumentative" trespasser at a disaster site.

The weakness of the amici's examples is strong evidence that retaliatory arrests are not nearly as serious a problem as they suggest. It therefore confirms the wisdom of a probable-cause element.

3. Finally, some amici assert that a probable-cause element will imperil the freedom of the press. *See* Brief of National Press Photographers Association 5; Brief of First Amendment Foundation 11. Once again, however, the examples that most vex amici involve arrests made *without* probable cause. *See, e.g., Lacey*, 693 F.3d at 922–23.

Amici assert an epidemic of retaliatory arrests of journalists, but the source on which they rely appears to count as a "journalist" anyone who happens to be holding a camera while committing a crime.

See, e.g., Minneapolis journalist arrested while covering protest, U.S. FREEDOM PRESS TRACKER, https://perma.cc/AY6B-HS2E (reporting arrest of "a journalist" with an "alt-weekly" publication who joined protesters blocking Interstate 94 in Minneapolis). In any event, the case law suggests that, on the rare occasions when reporters are arrested, that is because they joined in the illegal activity they were supposedly covering—for example, by becoming "part of the circle ... blocking fare gates," *Morse*, 2014 WL 572352, at *7, or by ignoring "no trespassing" signs and police warnings, *Eberhard*, 2015 WL 6871750, at *4–5.

C. Lozman's procedural criticisms of the probable-cause element are wrong

1. Lozman claims that it is impractical to plead lack of probable cause, because a plaintiff will not necessarily know the crime for which the officer had probable cause. That claim is unfounded. Every day, lawyers advise their clients on whether past or planned conduct violates the law. They need not "rea[d] the entire criminal code" to do so (Brief 46), just as the lawyers in this case did not have to read the entire *United States Reports* to prepare for this case. Instead, they review the facts, and then home in on those portions of the code that are most relevant. Plaintiffs' lawyers in retaliatory-arrest cases can do the same thing. In fact, they would have to do so anyway, even without a probable-cause element, because of the high probative value of probable cause in assessing motive and causation. At the very least, the plaintiff can serve the defendant with interrogatories regarding the statutes, if any, on which probable cause is predicated.

2. Lozman also claims that the probable-cause element is at the very least procedurally unnecessary, because "pleading and proof standards make it difficult for plaintiffs to establish animus." (Brief 34.) Wrong again. A plaintiff survives a motion to dismiss if he "plead[s] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). And he survives summary judgment if the evidence, taken "in the light most favorable" to him, raises a "genuine issue as to any material fact." *Tolan* v. *Cotton*, 134 S. Ct. 1861, 1866 (2014) (*per curiam*). These are low bars, and a plaintiff can surely clear them by alleging or showing that he was arrested for a less-than-serious crime after he said something controversial or hostile. The Ninth Circuit's experience proves as much. *Supra* 26–31.

Reichle highlights the inability of pleading and summary-judgment standards to do the work of the probable-cause element. In that case, Steven Howards noticed Vice President Cheney greeting members of the public at a shopping mall. Howards told a friend on the cell phone that he would ask the Vice President "how many kids he's killed today." 566 U.S. at 660. He entered the line to meet the Vice President, said that his "policies in Iraq are disgusting," and touched his shoulder as he departed. *Id.* at 661. Secret Service agents later confronted Howards, questioned him, and then arrested him for assault.

Lozman claims that even under his approach, the officers would have won a motion to dismiss. (Brief

37–38.) But how? Howards alleged that he was "approximately 2–3 feet away" from Vice President Cheney when he told him "I think your policies in Iraq are reprehensible," and that "numerous Secret Service agents" watched without saying a word. Second Amended Complaint ¶¶ 8, 10, *Howards* v. *Reichle*, No. 06-cv-01964 (D. Colo.) (ECF 31). Howards recalled how he recoiled "in shocked amazement" when accused of assault "five to ten minutes *later*." *Id.* ¶¶ 11, 13 (emphasis added). These presumptively true allegations raise a reasonable inference of animus—which is probably why the agents never bothered to file a motion to dismiss.

Lozman also suggests that his approach would have allowed the Secret Service agents to win at summary judgment (Brief 37). Again, how? The agent who overheard Howards' comment about asking Vice President Cheney "how many kids he's killed today" testified that he advised another agent to "pay particular attention" to Howards because these remarks were "unhealthy" and not "quite right." *Howards* v. *McLaughlin*, 634 F.3d 1131, 1136 (10th Cir. 2011). The arresting agent—who was specifically informed of that earlier conversation—acknowledged that "the conversation on the cell phone" partly motivated the arrest. *Id.* at 1137. On these facts, a reasonable jury could of course infer that the agents arrested Howards because they disliked his speech, not because they found his remarks suggested a threat.

Lozman persists that the causation element would save the day, because it is "almost certain" that "the arresting officers would have made the decision regardless." (Brief 37). But almost doesn't cut

it at summary judgment. Each year, thousands of politicians experience a pat on the shoulder without feeling assaulted, and none of the agents who *witnessed* the incident chose to stop Howards at the time, let alone arrest him. And many, many people make false but unimportant statements to federal officials without being hauled away in handcuffs. Would a jury really be prohibited from inferring that Howards would not have been arrested but for his anti-war speech? The Tenth Circuit didn't think so—after all, Agent Doyle admitted that the overheard remarks "disturbed" him, and Agent Reichle "admitted he considered this cell phone conversation when deciding to arrest." 634 F.3d at 1145. Far from demonstrating that the no-probable-cause element "is unnecessary" (Brief 37), *Reichle* proves precisely the opposite.

In all events, pleading and proof standards are not a panacea. "Even where personal liability does not ultimately materialize, the mere specter of liability may inhibit public officials in the discharge of their duties," "for even those officers with airtight [summary-judgment motions] are forced to incur the expenses of litigation and to endure the diversion of their official energy." *Atwater*, 532 U.S. at 351 n.22.

3. Finally, Lozman halfheartedly claims that qualified immunity will shield officers from liability. (Brief 37–38.) But if Lozman wins, qualified immunity will no longer do any work in retaliatory-arrest cases. The ruling would clearly establish the legal principle that improperly motivated arrests trigger liability even in the presence of probable cause; all that would be left to litigate would be factual questions regarding the motive for the arrest.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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Respectfully submitted,

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No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent does not dispute that "one of the principal characteristics by which we distinguish a free nation from a police state" is the "freedom of individuals verbally to oppose or challenge" government policies "without thereby risking arrest." *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987). And the United States acknowledges that a First Amendment violation occurs "whenever an official retaliates against an individual for having engaged in protected speech," including when that retaliation takes the form of an arrest for which "probable cause exists." U.S. Br. 8.

Nevertheless, both respondent and the United States assert that probable cause categorically bars Section 1983 damages lawsuits to remedy arrests that violate the First Amendment. To support that argument, respondent throughout its brief focuses on times when officers in the field can reasonably consider an individual's expression in deciding whether to arrest. *See, e.g.*, Resp. Br. 19-23, 26-31, 39, 42.

But the case before the Court (and similar examples offered by *amici*) involves an entirely different kind of arrest and shows the grave constitutional harm of an absolute bar. The defendant here is not an individual officer; it is a municipality. The arrest did not occur in the field; it occurred while petitioner was calmly speaking during the public comment portion of a city council meeting. The protected expression—a lawsuit against the city and "outspoken critic[ism]" of city officials and policies in previous weeks and months, Pet. App. 2a—provided no basis for arrest. A

federal court held that there was no probable cause for the only offenses with which petitioner was ever charged. J.A. 105, 108. Respondent's defense to liability here rests entirely on its midtrial unearthing of an obscure misdemeanor provision.

While probable cause for an underlying arrest can have probative force in a First Amendment retaliation suit, this Court should hold—at least in cases such as this—that it is not dispositive as a matter of law.

I. The common law does not justify an absolute bar.

1. Last Term, this Court again cautioned against plucking "'prefabricated components'" from common-law torts to "control the definition of § 1983 claims." *Manuel v. City of Joliet*, 137 S. Ct. 911, 921 (2017) (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006)). That is just what respondent does here.

Common-law doctrines regarding false arrest may provide a useful starting point in understanding Fourth Amendment constraints on arrests because both bodies of law address whether a person's conduct provides grounds for seizing him.

But the relevant *First* Amendment interest is not directed at arrests; rather, it condemns the use of governmental powers to inflict any form of official reprisal for protected expression. Neither respondent nor the United States actually claims that the common law has anything to do with what counts as a First Amendment violation. Rather they ask this Court to restrict a federal statutory remedy: the "action at law" provided by 42 U.S.C. § 1983. This Court should not limit that remedy by borrowing "elements," Resp. Br.

15, from tort causes of action not directed at free speech wrongs.

2. The First Amendment actually represents a repudiation of common-law doctrine. At common law, criticism that threatened to undermine respect for the government or public officials constituted the crime of seditious libel. But as this Court explained in *Bridges v. California*, 314 U.S. 252 (1941), "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press." *Id.* at 264 (citation omitted). The First Amendment "was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be." *N.Y. Times Co. v. United States*, 403 U.S. 713, 723-24 (1971) (Douglas, J., concurring) (citing Thomas Emerson, The System of Freedom of Expression (1970) and Zechariah Chafee, Free Speech in the United States (1941)).

3. In any event, the common law is far more ambiguous than respondent acknowledges. Respondent and the United States offer two common-law analogs: malicious prosecution and false arrest. Resp. Br. 16; U.S. Br. 9. It is fair to say that in malicious prosecution cases, the presence of probable cause means the action "will not lie." *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 402 (1852); *see* Resp. Br. 16-17; U.S. Br. 9-10, 24-25. But in *Dinsman*—the case the United States identifies as stating this Court's understanding of the common law, U.S. Br. 25—the Court squarely refused to impose that bar on false imprisonment claims. Such a bar was "not of a character to recommend it to favor." *Dinsman*, 53 U.S. at 402. Instead:

> Probable cause or not is of no further importance than as evidence to be weighed by [the jury] in connection with all the other evidence in the case, in determining whether the defendant acted from a sense of duty or from ill-will to the plaintiff.

Dinsman, 53 U.S. at 402. That mirrors the rule petitioner proposes: Probable cause is relevant to determining whether a Section 1983 defendant acted from retaliatory animus and whether the plaintiff would have been arrested absent that animus. But when the evidence shows that the arrest would not have occurred but for the defendant's desire to punish or deter protected speech, probable cause cannot absolutely bar suit. Petr. Br. 35-37.

4. Nor does the Restatement of Torts justify an absolute bar. The section on which respondent and the United States rely provides that "[t]he arrest of another is *not privileged* unless the actor makes the arrest *for the purpose* of bringing the other before a court, body or official or otherwise securing the administration of the law." Restatement (First) of Torts § 127 (1934) (emphasis added). The City and the United States fasten on an illustration that could arguably support a privilege in *mixed* motive cases. *See* Resp. Br. 16-17; U.S. Br. 24-25.

But the next illustration limits the scope of the privilege, stating that if an officer arrests a thief "to force [him] to restore the goods to [the victim] and not to bring [him] before a magistrate for commitment," then the arrest is *not* privileged. *Id.* § 127 cmt. a., illus. 2. Thus, the common law would not privilege catch-and-release arrests designed not to "secur[e] the

administration of the law" but instead to harass individuals for their protected expression or to prevent journalists from covering a story. *Amici* have pointed to numerous examples of this practice. *See* Br. of First Amendment Found. 10-18; Br. of Inst. for Free Speech 7-16; Br. of Nat'l Press Photographers Ass'n 8-17.

If probable cause provides no privilege in tort cases for arrests that accomplish even legitimate government purposes like restitution, there is even less justification for this Court to invent a privilege in Section 1983 cases for arrests used for the constitutionally forbidden goal of punishing, preventing, or deterring protected expression.

5. For all its attachment to the common law, respondent seems unaware of how closely its brief echoes the repudiated doctrine of seditious libel. Respondent accuses petitioner of using the public comment period "to air grievances against City leadership, almost always making vague accusations of corruption," Resp. Br. 1. It points to occasions on which petitioner offered the kind of "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), that the First Amendment protects but the common law punished. *See* Resp. Br. 3 (describing some of those comments). Left unmentioned in respondent's self-congratulatory account of its forbearance is its contemporaneous attempt to evict petitioner and his floating home from its marina. A jury ultimately found that petitioner's "protected speech was a substantial or motivating factor" behind that attempt. *Lozman v. City of Riviera Beach*, 713 F.3d 1066, 1070 (11th Cir. 2013).

Respondent's account also reinforces petitioner's claim that his arrest was the product of animus against his protected expression. Councilmember Wade was not the only official who "vented" her "frustrat[ion]" that petitioner had exercised his Petition Clause right to sue the City. Resp. Br. 2. The Council's discussion of that lawsuit (which this Court can read for itself, J.A. 150-183) is marbled with expressions of anger. For example, two other councilmembers suggested hiring a private detective, in part to investigate petitioner's contact with Governor Bush (contact itself protected by the First Amendment). *See* J.A. 173-74, 181. When a reporter asked her about the transcript, Wade doubled down:

> I told him that I would put my foot so far up his behind he would think my toe is his tonsil. I ain't going to pay nobody to kill him. But if he gets into my face, I will get him out of it.

Bob Norman, *Targeting Citizen Lozman*, Broward/Palm Beach New Times, Dec. 13, 2007, https://tinyurl.com/17-21RB2; *see* Tr. 29-30 (11/17/2014), ECF No. 770.

This Court should not interpret Section 1983 to allow jurisdictions to accomplish through arrests that violate the First Amendment what they can no longer accomplish through seditious libel prosecutions.

II. As a general rule, probable cause does not bar Section 1983 claims challenging unconstitutional arrests.

1. Respondent recognizes that probable cause does not bar *Fourteenth* Amendment-based Section 1983 damages lawsuits challenging an arrest. Indeed, respondent has conceded that the very sort of arrest at

issue here—"an arrest motivated by protected speech"—can "constitute an arbitrary enforcement decision that gives rise to an Equal Protection claim." BIO 21. It still has not explained why, if this is so, such suits are barred when they are pursued under the First Amendment. *See* Petr. Reply 12.

Nor is there a relevant distinction between considering race and considering expression. Police officers can sometimes legitimately take race into account—for example, in deciding whether an individual matches the description of a suspect—but cannot base their arrest decisions on animus against individuals of a particular race. So, too, police officers can sometimes "permissibly consider speech in deciding whether to arrest," U.S. Br. 20 n.6; *see also* Petr. Br. 33-34; Resp. Br. 46, but cannot base arrest decisions on animus against protected speech. In petitioner's case, for example, respondent does not suggest that Councilwoman Wade's "frustrat[ion]" with petitioner's protected expression, Resp. Br. 2, could justify his arrest.

Furthermore, respondent is wrong in perceiving an "objective safeguard[]" that differentiates equal protection claims from First Amendment ones, Resp. Br. 46. Respondent asserts that equal protection challenges to an arrest require identifying similarly-situated individuals of another race "against whom the government did not enforce the law." *Id.* At least with respect to arrests, respondent has confused an evidentiary issue with a substantive one. When there is no direct evidence of an arresting officer's racially discriminatory motive, showing that persons of other races were not also arrested may be practically necessary to prove a discriminatory purpose. But surely if

an officer's body camera captures him announcing "I don't like Latinos, and that's why I'm arresting you," the arrestee could prevail without marshaling evidence about the officer's other arrests. A similar rule should govern First Amendment retaliation cases. *See* Br. of MacArthur Justice Ctr. 17-18 (describing officers recorded discussing how to justify arresting a protester).

2. Not even all *Fourth* Amendment Section 1983 lawsuits face an absolute bar like the one respondent proposes here. Excessive use of force that violates the Fourth Amendment can support a Section 1983 damages suit "notwithstanding the existence of probable cause to arrest." *Graham v. Connor*, 490 U.S. 386, 394 (1989); *see Tennessee v. Garner*, 471 U.S. 1, 7-9 (1985).

The treatment of excessive use of force cases further erodes the City's officer-protection-above-all rationale for an absolute bar. Three of the six Section 1983 cases respondent chose as poster children for the necessity of the bar also included excessive force claims that would have gone to trial in any circuit. *See* Resp. Br. 26-30 (citing *Mihailovici v. Snyder*, 2017 WL 1508180, at *4 (D. Or. Apr. 25, 2017); *Mam v. City of Fullerton*, 2014 WL 12573550, at *1 (C.D. Cal. July 24, 2014); and *Holland v. City of San Francisco*, 2013 WL 968295, at *4-5 (N.D. Cal. Mar. 12, 2013)). In the face of this reality, respondent can state no principled or pragmatic reason for extinguishing claims under the First Amendment.

3. Respondent denies that it conflates the Fourth and First Amendments and insists that its rule is respectful of First Amendment "values." Resp. Br. 34-39. But the cause of action it embraces provides no protection for First Amendment *rights*. A plaintiff who

proves that he was arrested without probable cause has already established liability under Section 1983 on a Fourth Amendment claim. The only thing respondent's "First Amendment" cause of action does is to add further hurdles to a plaintiff: He must also show protected speech, animus, and causation, at which point the defense can still prevail.

A rule that requires judgment be entered for the defense even when the government concedes that it would not have pursued an arrest had the citizen not spoken out is not an "of course imperfect" implementation of the First Amendment, Resp. Br. 36. It is a betrayal.

III. This Court should not extend its decision in *Hartman v. Moore* to arrests that violate the First Amendment.

Contrary to the arguments advanced by respondent and the Government, the differences between suits alleging retaliatory prosecutions and ones alleging retaliatory arrests outweigh the similarities. In fact, arrest cases are really no different than the kinds of cases regularly adjudicated under the "standard" First Amendment retaliation framework, U.S. Br. 2, laid out in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

1. Respondent and the United States misunderstand why *Hartman v. Moore*, 547 U.S. 250 (2006), imposed a no-probable-cause requirement on retaliatory-prosecution claims.

It was not because evidence of probable cause is readily available and probative, U.S. Br. 11; Resp. Br. 33. To the contrary, the Court stated that "[t]his alone

does not mean, of course, that a *Bivens* or § 1983 plaintiff should be required to plead and prove no probable cause." *Hartman*, 547 U.S. at 261.

Rather, the Court's decision flowed from the values that undergird absolute prosecutorial immunity. *See Hartman*, 547 U.S. at 262. The Court's use of *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), and *United States v. Armstrong*, 517 U.S. 456 (1996), to explain the "distinct problem of causation" shows that the problem stems from the need to avoid inquiring into prosecutorial decisionmaking, *Hartman*, 547 U.S. at 263.

But a Section 1983 retaliatory-prosecution suit against even a "nonprosecutor" can undermine prosecutorial immunity, because winning requires showing how the vengeful nonprosecutor "influence[d]" the prosecutor's decision to proceed, *Hartman*, 547 U.S. at 262. Even these suits will involve precisely the inquiry into prosecutorial decisionmaking that absolute immunity is designed to forestall: the parties in the Section 1983 suit are almost sure to seek information from the "the prosecutor's mind," *id.* at 263, and his files to prove (or rebut) causation. This Court was willing to permit Section 1983 suits to proceed if plaintiffs can plead and prove the absence of probable cause because then the claim can be litigated without intruding on prosecutorial decisionmaking. The lack of probable cause provides a "prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the charge." *Id.* at 265. In short, absolute prosecutorial immunity is the explanation for why the Court struck the balance it did in *Hartman*.

But absolute prosecutorial immunity plays no role whatsoever in retaliatory-arrest cases. The individual government defendants lack absolute immunity; they possess only qualified immunity. *See Scheuer v. Rhodes*, 416 U.S. 232, 245-48 (1974). Municipal defendants like respondent enjoy no immunity at all. *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). And arrest decisions are the quintessential example of a decisionmaking process that is opened up to scrutiny every day.

2. The causation problem is not "even greater" in retaliatory-arrest cases than in retaliatory-prosecution cases, Resp. Br. 32.

To the contrary: In suits where the arresting officer is alleged to harbor the retaliatory animus, there is "no [causal] gap to bridge" at all. *Reichle v. Howards*, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring in the judgment). And even in cases where the defendant is an official (or a municipality) that is alleged to have caused the arrest, there is no distinctive causation problem.

Cases like petitioner's are on all fours with employment discrimination cases based on a "cat's paw" theory. *See, e.g., Staub v. Proctor Hospital*, 562 U.S. 411 (2011). In those cases, liability attaches to an employer when a supervisor's animus leads a human resources department acting on his recommendation to fire an employee. *See id.* at 418-22. Federal courts regularly adjudicate those cases without any apparent difficulty.

The causal chain in petitioner's case is similar. Petitioner alleged that a vengeful city official directed a policeman to arrest him. The fact that the arresting

officer acted without a retaliatory motive of his own spares him from liability. But it should not spare respondent.[1]

Furthermore, respondent compares apples and oranges when it contrasts "the typical *arrest*"—"a one-off, highly charged encounter"—with the "typical *Mt. Healthy case*," Resp. Br. 43 (emphasis added). In fact, retaliatory-arrest *cases* quite often fit respondent's description of litigation under *Mt. Healthy*. For example, petitioner had a "long-term relationship" with the Riviera Beach City Council, *id.*, "one giving rise to considerable evidence of intent—including a paper trail," *id.* And in many cases—including ones identified by respondent itself—there is a "set of similarly situated suspects for ready comparison," *id.* at 44. *See Mam v. City of Fullerton*, 2013 WL 951401, at *5 (C.D. Cal. Mar. 12, 2013) (Resp. Br. 27); *Morse v. S.F. Bay Area Rapid Transit Dist. (BART)*, 2014 WL 572352, at *9-10 (N.D. Cal. Feb. 11, 2014) (Resp. Br. 28).

3. Of course, evidence regarding probable cause can be *relevant* in retaliatory-arrest cases. Petr. Br. 35-37. But petitioner has already explained why *Hartman*'s pleading and proof requirements are unfair and unworkable here. *Id.* at 46-48. Petitioner's concern is hardly "unfounded," Resp. Br. 52; *see* U.S. Br. 14-15, given his experience. For eight years after his arrest, no one had any idea that Section 871.01(1) of the Florida Statutes might bear on his First Amendment claim. Indeed, until respondent stumbled across that statute midway through the trial, petitioner had a

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[1] Respondent has abandoned any argument before this Court that municipal liability doctrine should bar petitioner's claim.

winning Fourth Amendment claim as a matter of law, and no bar against his First Amendment claim either. *See* Petr. Br. 9-10. (The Eleventh Circuit's absolute bar, which respondent seeks to nationalize, did not prevent *petitioner's* case from going to trial.) How should petitioner be expected to know more about the law than the officials who arrested him and the attorneys who sought to justify his arrest? Thus, respondent is wrong to claim that *Devenpeck v. Alford*, 543 U.S. 146 (2004), provides an "important limitation" on retaliatory arrests, Resp. Br. 47. To the contrary, it licenses an arrest-now-and-hope-to-find-some-offense-later strategy.

4. Finally, respondent is wrong to suggest that "arrests backed by probable cause pose little danger to the freedom of speech." Resp. Br. 38. As petitioner has already explained, when the government "pick[s] the man and then search[es] the law books," it can nearly always find *some* crime for which there is probable cause. Petr. Br. 22 (quoting Robert H. Jackson, The Federal Prosecutor 4-5 (1940)). There are precious few of us who never jaywalk, take computer paper home from the office, or exceed the speed limit. Petr. Br. 23. Government animus against protected expression is fortunately rare. But when it exists, the probable cause requirement is no real restraint at all. There will be opportunities enough to engage in arrests that satisfy the Fourth Amendment even if they violate the First.

IV. Imposing an absolute bar on retaliatory-arrest claims is unnecessary to protect officers from meritless claims.

Respondent claims that the absolute bar rule is necessary to protect police officers against meritless claims. Not so. Along with the framework laid out in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), this Court's decisions regarding qualified immunity and pleading standards provide the protection reasonable government actors deserve. Experience confirms the workability of an approach where probable cause has probative force, but "is not dispositive." *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008). It is telling that only two of the nine states in the circuit which has used petitioner's proposed rule for at least a decade have chosen to appear as *amici* in support of respondent.

1. Respondent and the Government would have this Court believe that the typical First Amendment retaliatory-arrest claim involves a line-level police officer in the field who had to make a near-instantaneous decision whether to arrest someone to "prevent[] a massacre," Resp. Br. 7, and where the suspect's arguably protected expression "bear[s] directly on the probable cause determination." U.S. Br. 19; *see* Resp. Br. 19-23.

It is unclear why they think that. Petitioner's case, for example, matches literally *none* of those features (which might explain why neither respondent nor the Government ever explains why their proposed rule *should* bar suits like his). *See supra* at 1-2. Nothing about his case required split-second decisionmaking regarding anything like "a risk to the

public," "a danger to the victim," or "a danger to the officer." Resp. Br. 20.

When respondent turns to actual Section 1983 suits, as opposed to stylized "examples" only "modeled" on reported cases, Resp. Br. 20,[2] it offers precious few instances of line-level officers being subjected to trial on meritless retaliatory-arrest claims. Respondent's cherry-picked sample of six cases (drawn from a half-decade of litigation in the Nation's most populous Circuit), proves the point. *See* Resp. Br. 26-30 (listing the cases).

Of respondent's six cases, three did not present retaliatory-arrest claims against line-level officers who had made decisions in the field. *See Ballentine v. Las Vegas Metro. Police Dep't*, 2017 WL 3610609, at *4 (D. Nev. Aug. 21, 2017) (arrest pursuant to criminal complaint); *Mihailovici v. Snyder*, 2017 WL 1508180, at *1-2 (D. Or. Apr. 25, 2017) (police chief); *Morse v. S.F. Bay Area Rapid Transit Dist. (BART)*, 2014 WL 572352, at *2 (N.D. Cal. Feb. 11, 2014) (deputy police chief). Three involved arrests preceded by weeks or months of protected First Amendment expression, and the courts pointed to *this* expression—not expression coincident with the arrest—as the source of the retaliatory animus. *See Ballentine*, 2017 WL 3610609, at *1-4; *Eberhard v. California Highway Patrol*, 2015 WL 6871750, at *7 (N.D. Cal. Nov. 9, 2015); *Morse*, 2014 WL 572352, at *9. And two involved evidence that the

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[2] Several of respondent's examples are not even based on cases involving arrests. *See, e.g., Kilpatrick v. United States*, 432 F. App'x 937 (11th Cir. 2001) (per curiam) (traffic stop); *Wayte v. United States*, 470 U.S. 598 (1985) (indictment).

plaintiff was singled out for arrest from among otherwise similarly situated individuals because he was engaged in protected First Amendment activity. *See Morse*, 2014 WL 572352, at *9-10; *Mam v. City of Fullerton*, 2013 WL 951401, at *5 (C.D. Cal. Mar. 12, 2013). If these are the most persuasive examples respondent can offer, the absolute bar rule is a solution without a problem.[3]

2. Even when it comes to officers in the field, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It strikes the proper balance between ensuring the "vindication of constitutional guarantees" and the risk of "*unduly* inhibit[ing] officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (emphasis added).

Respondent is simply wrong that if this Court rejects the Eleventh Circuit's absolute bar, "qualified immunity will no longer do any work," Resp. Br. 55. Of course, qualified immunity will not protect blatantly vengeful officers. Nor should it, if the First Amendment protection against retaliatory arrests is to mean anything.

But qualified immunity will still be available in cases where it is not clearly established that particular speech is protected or in cases where it is not unreasonable for officers to have taken particular protected speech into account. An officer need not "psychoanalyze himself" to determine whether he was

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[3] Nor would an absolute bar even have spared the defendants a trial in the three cases where the plaintiffs also had triable excessive-use-of-force claims. *See supra* at 8.

"considering speech in a good way or a bad one." Resp. Br. 42-43.

Fogel v. Collins, 531 F.3d 824 (9th Cir. 2008), shows how. The plaintiff challenged his arrest because it was based in part on his van's bearing the words "A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST!" with "W.O.M.D. ON BOARD." *Id.* at 827. While the court determined that this speech was not a true threat, it nonetheless granted the officers qualified immunity because under the circumstances it was unclear whether "all reasonable officers would have concluded that Fogel's speech was protected by the First Amendment," *id.* at 834.

By contrast, the absolute bar rule swings way too far in the other direction. It would immunize policemen from Section 1983 liability even if they admit that disapproval of protected expression was the only reason they enforced an otherwise never-used statute. It would immunize higher-level officials from Section 1983 liability even if they admit that they directed an arrest in order to punish the arrestee for prior protected expression or to deter future criticism. And it would immunize municipalities from Section 1983 liability even though this Court has refused to extend any form of immunity to municipal defendants. That cannot be right.

3. Pleading rules also weed out meritless First Amendment claims. A Section 1983 plaintiff must do more than plead facts that are "merely consistent" with retaliation for a complaint to survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 557 (2007). A conclusory allegation of animus is insufficient; there must be sufficient factual detail in the complaint to make the existence of animus "plausible"

to a court "draw[ing] on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Moreover, the *Mt. Healthy* framework requires proof of retaliatory "animus" toward protected speech, *Hartman v. Moore*, 547 U.S. 250, 260 (2006), not simply consideration of such speech. Thus, it is not enough for a plaintiff to allege merely that he was engaged in protected speech at the time of his arrest.

Cases will quickly get knocked out absent either plausible allegations that government officials directly expressed animus or sufficiently detailed allegations regarding a course of dealing between the plaintiff and the government that provides strong circumstantial evidence of hostility to the substance of the plaintiff's First Amendment activity. In petitioner's case, for example, the transcript from the closed-door session was indispensable to withstanding respondent's motion for summary judgment. *See* Pet. App. 17a-18a, 31a-32a. Such probative evidence of animus—and therefore, the universe of cases that will proceed—is rare indeed.

V. Alternatives to Section 1983 suits do not justify the absolute bar.

Respondent and its *amici* claim that Section 1983 damages suits for retaliatory arrests are unnecessary because there are "numerous" other "barriers to the kinds of arrests that Lozman fears." Resp. Br. 48; *see also* Br. of D.C. 16-24 ("D.C. Br,"); Br. of Nat'l Ass'n of Counties 11-17 ("NAC Br."); U.S. Br. 26-30. The amount of space they devote to this issue implicitly concedes the need to deter arrests that violate the First Amendment, even if those arrests do not violate

the Fourth Amendment as well. But none of the alternatives they identify comes anywhere close to a meaningful substitute for Section 1983 suits.

1. Respondent is wrong to suggest that practical considerations will prevent retaliatory arrests, Resp. Br. 48-49.

It may be true, as a general matter, that police departments will not make arrests for petty offenses when the costs of doing so "are simply too great to incur without good reason." Resp. Br. 48 (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001)). But retaliatory animus provides such a reason. Respondent does not dispute, nor can it, the harm an arrest inflicts on the person arrested or the chilling effect of arrests on the public. Petr. Br. 23-25. So even if a retaliatory arrest is not logistically costless, an official who dislikes protected expression may be willing to incur those costs in order to inflict a particularly potent form of retaliation.

Moreover, many retaliatory arrests never effectively get "beyond booking," Resp. Br. 48. Indeed, a number of the cases discussed by petitioner's *amici* involve so-called catch-and-release arrests, in which individuals are freed before any formal processing at all. *See supra* at 4-5; Pet. App. 4a-5a. The "costs" respondent identifies thus provide no real barrier or deterrent to using arrests as a tool for retaliation.

What is more, respondent's exclusive focus on line-level actors leaves it silent with respect to the cost-benefit calculus confronting municipalities and higher-level officials. After all, Councilwoman Wade did not have to process petitioner's arrest. Her entire involvement occupied only seconds of her time.

In fact, "the political accountability" of "local lawmakers and law-enforcement officials," Resp. Br. 48 (quoting *Atwater*, 532 U.S. at 353), actually undermines the City's argument. No doubt Dr. Martin Luther King Jr.'s arrest for speeding was popular with the people who elected segregationist public officials. "An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 523 (1989) (Scalia, J., concurring).

2. Nor does vagueness doctrine provide an "appropriate antidote" to the risk of retaliatory arrest, Resp. Br. 49.

First, a government does not have to rely on vague statutes to effect pretextual arrests of people whose protected expression it does not like. (A prohibition against jay-walking is both very clear *and* ripe for abuse).

Second, contrary to respondent's argument, Resp. Br. 49, many broad statutes that are amenable to retaliatory enforcement are not *unconstitutionally* vague. The statute involved here is an example. The Florida Supreme Court adopted a construction of Section 871.01(1) designed to avoid First Amendment problems. *S.H.B. v. State*, 355 So. 2d 1176, 1178 (Fla. 1977). Even if finding probable cause for petitioner's arrest requires reading Section 871.01(1) aggressively, the statute is not unconstitutional on its face.

3. To the extent respondent floats the notion that suits for injunctive relief can do the work that damages claims otherwise perform, Resp. Br. 47, it is mistaken.

This is a lesson of *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983). There, this Court held that an individual lacks standing to seek injunctive relief even after he has been subject to an unconstitutional policy (for Lyons, the unjustifiable use of a deadly chokehold) unless he can show he will be subjected to a future *unconstitutional* use of the same practice. Thus, as long as *some* future arrest of the plaintiff under *some* criminal statute would comport with the First Amendment, a plaintiff would lack standing to seek injunctive relief against retaliatory arrests as a category.

Trying to map the contours of an injunction against retaliatory arrests shows why the prospect of combatting First Amendment violations this way is a pipe dream. What is the injunction to say? "Do not arrest the plaintiff for a crime [or perhaps for a specific list of crimes], even if you have probable cause, when animus against his protected expression is a but-for cause of the arrest in the sense that an individual who has not engaged in such protected expression would not be arrested"? Does the injunction bind all the officers in a particular department? All officials who have the power to direct an arrest? And how is such an injunction to be enforced? Through a contempt proceeding? Against whom? If respondent is anywhere near right about the cost to officer performance of damages lawsuits, it is worth remembering that in a Section 1983 damages action, the officer is protected by both qualified immunity and indemnification; a person accused of contempt has neither.

To the extent respondent is right that a court could "certainly enjoin" an unconstitutional policy even if damages are unavailable, Resp. Br. 47, it could

certainly entertain a suit for damages as well. In *Los Angeles County v. Humphries*, 562 U.S. 29 (2010), this Court declared that "[n]othing in the text of § 1983" suggests that "§ 1983's elements" should "change with the form of relief sought." *Id.* at 37. If respondent is willing to countenance suits for injunctive relief without insisting on a lack-of-probable-cause element—and it is—then it must also accept damages suits without insisting on such an element. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 253, 256 (2009) (refusing to displace Section 1983's damages remedy absent clear evidence of congressional intent).

4. Nor, contrary to the suggestion floated in the Government's brief, do federal criminal prosecutions under 18 U.S.C. §§ 241 and 242 "mitigate[]" the "possibility that officers may engage in retaliatory arrests notwithstanding the existence of probable cause." U.S. Br. 28. It is telling that the United States points to not a single case in which the Department of Justice has brought a prosecution against any police officer, let alone any other official, for arresting (or causing the arrest of) an individual in retaliation for the exercise of First Amendment rights.[4]

5. Finally, all the citations, by the United States and other *amici*, to potential remedies for unconstitutional arrests provided by state law or municipal policy, are entirely beside the point. *See* U.S. Br. 29 n.7; D.C. Br. 16-24; NAC Br. 11-17.

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[4] This is not because the Department is unaware that police departments retaliate against protected expression. *See* Pet. 17 (citing the Department's recent findings regarding the Baltimore Police Department); Br. of MacArthur Justice Ctr. 3-5, 8-9 (other DOJ reports).

First, the fact that police departments "have established procedures for receiving and processing citizen complaints," NAC Br. 15; *see* D.C. Br. 17-20, cannot justify an absolute bar. The 200 civilian oversight boards nationwide are "still just a fraction compared to the nearly 18,000 law enforcement agencies across the United States." Priyanka Boghani, *Is Civilian Oversight the Answer to Distrust of Police?*, Frontline Newsletter, July 13, 2016, https://tinyurl.com/17-21RB1.

And those entities have no role whatsoever in disciplining or deterring government officials outside law enforcement agencies whose retaliatory animus impels them to direct officers to make arrests.

More fundamentally, this Court could not have been clearer in its landmark decision in *Monroe v. Pape*, 365 U.S. 167 (1961), which "rejected the view" that Section 1983 "does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts under the State's common law." *Zinermon v. Burch*, 494 U.S. 113, 124 (1990). It is simply "no answer" to a Section 1983 damages claim "that the State has a law which if enforced would give relief." *Monroe*, 365 U.S. at 183.

Still less can state laws that *do not* provide relief defeat a Section 1983 damages claim. It is telling that although the National Association of Counties lists all fifty states' parallels to the First Amendment, NAC Br. at 11 n.10, it does not offer any evidence that state law has provided effective remedies to individuals subjected to retaliatory arrests. If the presence of practical considerations, potential criminal liability, and state-law correctives do not immunize other constitutional challenges to arrests from scrutiny under Section

1983—and they do not—then they should not preclude First Amendment-based suits either.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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No. 17-21

In the Supreme Court of the United States

FANE LOZMAN, PETITIONER

v.

CITY OF RIVIERA BEACH, FLORIDA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a claim for damages based on an alleged retaliatory arrest in violation of the First Amendment, brought under 42 U.S.C. 1983, is foreclosed when the arrest was supported by probable cause.

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Black's Law Dictionary (10th ed. 2014) 24
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Dan B. Dobbs et al., *The Law of Torts* (2d ed. 2011):
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Restatement (Second) of Torts:
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns whether a constitutional tort claim for damages under 42 U.S.C. 1983, predicated on an alleged retaliatory arrest in violation of the First Amendment, is foreclosed when the arrest was supported by probable cause. The United States participated as amicus curiae in *Reichle* v. *Howards*, 566 U.S. 658 (2012), which presented the same issue in the context of a claim against federal officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The United States has a substantial interest in the circumstances in which federal officers may be held liable for damages in civil actions for alleged violations of constitutional rights. It also has a substantial interest in safeguarding those rights, including through the use of federal criminal and civil enforcement authorities.

STATEMENT

1. "[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions * * * for speaking out." *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006). In a "standard" constitutional tort action seeking damages for such retaliation—such as a claim involving an adverse employment action or the denial of government benefits—a burden-shifting framework is used to determine whether the government's action against the plaintiff was taken because of the plaintiff's protected speech. *Id.* at 260. Under that framework, the plaintiff must establish a prima facie case that protected speech was a substantial or motivating factor in bringing about the adverse action, at which point the burden shifts to the defendant to prove that the same action would have occurred without the retaliatory motive. *Ibid.*; see *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977).

This Court has modified that approach in cases where the alleged retaliation takes the form of a criminal prosecution. In *Hartman*, the Court held that a plaintiff bringing a constitutional tort claim for retaliatory prosecution based on the exercise of First Amendment rights must plead and prove, as an element of the cause of action, the absence of probable cause. 547 U.S. at 252. The Court did not clarify in *Hartman* whether the same requirement would apply to claims alleging retaliatory arrest. That question was presented in *Reichle* v. *Howards*, 566 U.S. 658 (2012), but the Court resolved that case on the alternative ground of qualified immunity. *Id.* at 664-665.

2. This case presents the issue left open in *Reichle*. Petitioner is a resident of the City of Riviera Beach,

Florida (City), and an "outspoken critic" of the City's waterfront redevelopment plan. Pet. App. 2a.[1] In June 2006, petitioner filed a lawsuit seeking to invalidate the redevelopment plan. *Id.* at 2a-3a. Shortly thereafter, the City Council held a closed-door session during which one councilmember, Elizabeth Wade, expressed her frustration with the lawsuit and proposed taking steps to "intimidate" petitioner and others who supported it. *Id.* at 17a (citation omitted). Near the end of the meeting, the councilmembers agreed to do "whatever it takes" to "beat" petitioner's lawsuit. *Id.* at 18a (citation omitted).

On November 15, 2006, the City Council held a regular public meeting. Pet. App. 3a. Petitioner sought and received permission to address the Council during the "public comment period" of that meeting. *Id.* at 3a & n.2. Petitioner began his remarks by chiding the City's mayor and one of the councilmembers for not being present to hear his comments. *Id.* at 4a. The councilmembers did not interrupt those statements. *Ibid.* He then proceeded to make several allegations about corruption among officials in Palm Beach County, a separate jurisdiction, that were not germane to City business. *Ibid.* Councilmember Wade informed petitioner that he was not allowed to "stand up and go through that," to which petitioner replied, "Yes, I will." *Ibid.* Councilmember Wade again instructed petitioner not to address issues related to Palm Beach County, but petitioner ignored that instruction and "continued with his allegations." *Ibid.*

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[1] Petitioner has had other disputes with the City over the years. *See, e.g., Lozman* v. *City of Riviera Beach*, 568 U.S. 115, 118-119 (2013) (describing dispute between petitioner and the City over petitioner's decision to dock his houseboat at a City marina).

At that point, Councilmember Wade summoned a police officer. Pet. App. 4a. As the officer approached the lectern where petitioner was standing, petitioner began "speaking louder" and asserted his right to "inform[] the citizens" about his allegations. *Ibid.* The officer gestured to petitioner and said, "Will you walk outside with me[?] I need to talk to you." *Ibid.* (brackets in original). Petitioner told the officer, "I'm not finished," and continued speaking about the alleged corruption in Palm Beach County. *Ibid.* The officer responded that petitioner would "be arrested" if he did not go outside. *Ibid.* Petitioner again refused, stating "I'm not walking outside, I haven't finished my comments." *Ibid.* Councilmember Wade then asked the officer to "carry him out." *Ibid.*

Petitioner was arrested and charged with disorderly conduct and resisting arrest. Pet. App. 4a. The state's attorney concluded that the arrest was supported by probable cause but nonetheless dismissed the charges. *Id.* at 4a-5a.

3. Petitioner filed a constitutional tort action seeking damages from the City under 42 U.S.C. 1983. Pet. App. 5a. He claimed, among other things, that his arrest was unlawful retaliation for the exercise of his First Amendment rights, including his criticisms of the redevelopment plan, the filing of his lawsuit seeking to invalidate the plan, and his efforts to expose public corruption. *Id.* at 5a, 52a, 59a.

The district court denied the parties' motions for summary judgment and held a trial on petitioner's complaint. See Pet. App. 15a-50a. In its jury instructions, the court stated that petitioner's retaliatory-arrest claim required him to prove that his speech was protected by the First Amendment and that the officer who

arrested him (1) acted under color of law; (2) was "motivated" to make the arrest by "impermissible animus" and a desire "to retaliate" against petitioner because of his speech; and (3) "lacked probable cause to believe that [petitioner] had or was committing a crime." *Id.* at 59a-60a. The court instructed the jury that, as a matter of law, petitioner's speech was constitutionally protected and that the officer acted under color of law. *Id.* at 60a. As for the probable-cause element, the court had earlier determined that probable cause did not exist for either of the charges initially cited as grounds for petitioner's arrest (disorderly conduct and resisting arrest). J.A. 105, 108. It instructed the jury on the elements of a different offense—disturbing a lawful assembly, in violation of Fla. Stat. § 871.01(1) (2006)—that the City had identified for the first time during trial. Pet. App. 61a; see J.A. 95, 120-121.[2]

The jury returned a verdict in favor of the City on all of petitioner's claims, including the First Amendment retaliatory-arrest claim. Pet. App. 6a.

4. The court of appeals affirmed. Pet. App. 1a-14a. Petitioner argued that a finding of probable cause was against the weight of the evidence and that the district court had erred in instructing the jury that the arresting officer—and not the City or its councilmembers—

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[2] Section 871.01 makes it a misdemeanor to "willfully interrupt[] or disturb[] * * * any assembly of people met * * * for any lawful purpose." Fla. Stat. § 871.01(1) (2006). The district court instructed the jury that, "to have probable cause to arrest a person for th[at] crime," reasonable grounds must exist to support a finding that (1) the person intended to impede the assembly or acted "with reckless disregard of the effect of his behavior"; (2) "a reasonable person would expect" the acts "to be disruptive"; and (3) the "acts did, in fact, significantly disrupt the assembly." Pet. App. 61a-62a; see *S.H.B.* v. *State*, 355 So. 2d 1176, 1178 (Fla. 1977).

had to have a retaliatory motive. Pet. C.A. Br. 23-39. The court rejected those arguments. It inferred from the verdict that the jury had found probable cause, Pet. App. 8a-9a, which the court concluded was consistent with the evidence, *id.* at 9a (finding that a reasonable officer could have believed that petitioner was disrupting the meeting "or was about to" do so based on his refusal to comply with repeated requests to yield the floor). The court further held that, "even assuming" the district court's instructions impermissibly required the jury to find that the officer acted out of a retaliatory motive, rather than the City or its councilmembers, any error was harmless because the presence of probable cause "defeats [a] First Amendment retaliatory arrest claim as a matter of law." *Id.* at 10a-11a (citing *Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002)).[3]

SUMMARY OF ARGUMENT

A. In *Hartman* v. *Moore*, 547 U.S. 250 (2006), this Court held that a plaintiff bringing a constitutional tort claim of retaliatory prosecution in violation of the First Amendment must prove, as an element of the tort, the absence of probable cause to charge him with a criminal offense. The Court emphasized the highly probative nature of probable-cause evidence in determining whether

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[3] Petitioner agrees with the court of appeals' assertion that the jury's verdict was based on the existence of probable cause. See Pet. Br. 13 ("The jury found probable cause for petitioner's arrest • • • and returned a verdict for the City."). It is not evident, however, why the jury's general verdict necessarily rested on the existence of probable cause, rather than on a lack of retaliatory motive or a failure of proof that the City was responsible for the officer's actions. See J.A. 143-147 (verdict form); see also J.A. 132, 136-139 (describing retaliatory-motive element and requirements for municipal liability).

a prosecution is valid and in resolving the complex questions of causation that arise when a prosecutor's actions are alleged to have been induced by another official's animus. The Court concluded that making the absence of probable cause an element of the claim was an efficient method of resolving those complex issues.

Similar considerations apply to retaliatory-arrest claims. As with retaliatory-prosecution claims, probable-cause evidence will be readily available to help prove or disprove the contention that the arrest was brought about by retaliatory animus. And, as with retaliatory-prosecution claims, proof of the absence of probable cause provides a necessary objective screen for what would otherwise be a complex inquiry into causation. A claim of retaliatory arrest may, as here, involve an allegation that a police officer who lacked retaliatory animus was induced to make an arrest by another person who did have such animus. And even when an officer's own alleged animus is at issue, questions of causation are still more complicated than in other retaliation contexts because officers may have entirely legitimate reasons for taking speech into account in deciding whether to make an arrest.

As in *Hartman*, requiring a plaintiff to prove the absence of probable cause in order to succeed on a claim of retaliatory arrest provides a clear and objective basis on which judges and juries may resolve complex questions of causation and strikes an appropriate balance between the interest in protecting individuals from unreasonable law-enforcement interference and the public-safety interest in allowing officers to enforce the law without fear of being subjected to unfounded tort claims. Given the central importance of probable-cause evidence to virtually every claim of retaliatory arrest, it

"makes sense" to formalize the issue as an element of the tort. *Hartman*, 547 U.S. at 265-266.

B. The common law, which plays an important role in shaping the contours and requirements of constitutional tort actions, also supports extending *Hartman*'s no-probable-cause requirement to the context of retaliatory arrests. The closest analogues to petitioner's retaliatory-arrest claim are the common-law torts of malicious prosecution and false imprisonment. The absence of probable cause is an element of a malicious-prosecution claim and an affirmative defense to a claim of false imprisonment. In neither case would a claim like petitioner's, involving an arrest supported by probable cause but allegedly induced by another person's retaliatory animus, result in damages liability for the arresting officer. No sound reason exists to expose officers to greater liability under Section 1983.

C. Petitioner contends that adopting a no-probable-cause requirement in retaliatory-arrest cases would effectively license officers to make arrests that are supported by probable cause but are nonetheless retaliatory. That concern presumes, however, that a private damages remedy is the only way to deter such arrests. Federal, state, and local governments have enforcement tools at their disposal to remedy the underlying First Amendment violation that occurs whenever an official retaliates against an individual for having engaged in protected speech. Defining the elements of a retaliatory-arrest tort to preclude damages recovery if probable cause exists, as a means of addressing the practical concerns and complexities posed by such claims, does not imply a similar limitation on the scope of the underlying First Amendment right.

ARGUMENT

A DAMAGES CLAIM FOR RETALIATORY ARREST IN VIOLATION OF THE FIRST AMENDMENT REQUIRES THE PLAINTIFF TO PLEAD AND PROVE THE ABSENCE OF PROBABLE CAUSE

Petitioner argues at length (Br. 17-39) that First Amendment protections for expressive activity are important, that government retaliation on the basis of expressive speech is forbidden, and that the Court should apply its usual burden-shifting framework when analyzing claims of retaliatory arrest. Those same general arguments were advanced in *Hartman* v. *Moore*, 547 U.S. 250 (2006), in the context of a retaliatory-prosecution claim, and this Court was not persuaded. The Court held in *Hartman* that, because of the causal complexity posed by such claims and the acute relevance of probable-cause evidence to that causation inquiry, the existence of probable cause defeats a tort claim for damages based on alleged retaliatory prosecution in violation of the First Amendment. See *id.* at 261-266.

The question in this case is whether the same considerations that led the Court to require the absence of probable cause as an element of a claim of retaliatory prosecution also apply to a claim of retaliatory arrest. They do. In both contexts, the existence of probable cause provides an objective and independent legal ground for the challenged action that is "apt to * * * disprove retaliatory causation." *Hartman*, 547 U.S. at 261. Indeed, the case for requiring plaintiffs to prove the absence of probable cause in the context of a retaliatory arrest is stronger because the common law would not have permitted damages liability for the analogous torts of false imprisonment or malicious prosecution

when the officer had probable cause to arrest. Petitioner lacks any persuasive distinction for *Hartman* (Br. 39-48), and does not address the common law at all.

Petitioner is left to claim that, absent a damages remedy for plaintiffs under 42 U.S.C. 1983, States and localities could engage in widespread retaliatory arrests. Setting aside that the Court did not find that same concern compelling in *Hartman* with respect to retaliatory prosecutions, petitioner's concern can be addressed by treating the absence of probable cause as an element of a retaliatory-arrest tort, rather than as a limit on the scope of the First Amendment right itself. Doing so would protect officers against unfounded claims of retaliation while mitigating any risk that abusive practices could go unchecked.

A. Retaliatory Arrest, Like Retaliatory Prosecution, Requires A Plaintiff To Prove The Absence Of Probable Cause

1. Government action undertaken to retaliate against individuals for speech protected by the First Amendment is constitutionally forbidden "as a general matter." *Hartman*, 547 U.S. at 256; see *Wilkie* v. *Robbins*, 551 U.S. 537, 555 (2007). A plaintiff seeking damages for such retaliation in a constitutional tort action, however, must show that retaliatory animus was the "but-for cause" of the action. *Hartman*, 547 U.S. at 256, 260. As this Court has explained, "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." *Id.* at 260.

To establish the required causal relationship between retaliatory animus and government action in a "standard" case, this Court employs a burden-shifting

framework. *Hartman*, 547 U.S. at 260. Under that approach, the plaintiff must come forward with prima facie evidence that protected speech was a "substantial" or "motivating" factor in bringing about the adverse action. *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977). Once the plaintiff makes that showing, the burden shifts to the defendant to prove by a preponderance of the evidence that it would have taken the same action "even without the impetus to retaliate." *Hartman*, 547 U.S. at 260 (citing *Mt. Healthy*, 429 U.S. at 287).

2. In *Hartman*, this Court identified two primary features of retaliatory-prosecution cases that distinguish them from "standard" retaliation cases, 547 U.S. at 260, and that support requiring the plaintiff to prove an absence of probable cause as an element of a retaliatory-prosecution tort. First, the Court observed that in retaliatory-prosecution cases, the probable-cause inquiry "will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation." *Id.* at 261. "Demonstrating that there was no probable cause for the underlying criminal charge," the Court explained, "will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution." *Ibid.* Conversely, "establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive." *Ibid.* The Court reasoned that the probable-cause issue "is so likely to be raised by some party at some point that treating it as important enough to be an element will be a way to address the issue of causation without adding to time or expense." *Id.* at 265.

Second, the Court observed that "the requisite causation between the defendant's retaliatory animus and the plaintiff's injury" in a retaliatory-prosecution case "is usually more complex than it is in other retaliation cases." *Hartman*, 547 U.S. at 261. A constitutional tort action for retaliatory prosecution, the Court noted, "will not be brought against the prosecutor, who is absolutely immune," but instead against someone else "who may have influenced the prosecutorial decision but did not himself make it." *Id.* at 262. Thus, the Court explained, "the causal connection required" in such a suit "is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another," *ibid.*, whose prosecutorial decisions, moreover, would be entitled to a "presumption of regularity," *id.* at 263. The presence or absence of probable cause would have "obvious evidentiary value" in assessing whether another official's retaliatory animus induced the prosecutor's charging decision. *Id.* at 265.

The Court acknowledged that it could have chosen to permit a plaintiff to try to bridge that causal gap and show retaliatory prosecution using such "proof as the circumstances allow" in any given case, even when the prosecution was supported by probable cause. *Hartman*, 547 U.S. at 264. But, the Court concluded, "the very significance of probable cause means that a requirement to plead and prove its absence will usually be cost free by any incremental reckoning," and thus it "makes sense to require such a showing" as an element of the tort. *Id.* at 265-266. Balancing the benefits of that rule against the costs, the Court held that a lack of probable cause is necessary for a successful retaliatory-prosecution claim as a matter of law. *Id.* at 264 n.10.

3. Similar considerations counsel in favor of requiring the plaintiff to plead and prove a lack of probable cause as an element of a retaliatory-arrest tort action. See *Reichle* v. *Howards*, 566 U.S. 658, 667 (2012) (noting "the close relationship between retaliatory arrest and prosecution claims"). Retaliatory-arrest cases, like retaliatory-prosecution cases, are distinct from "standard" retaliation cases in the same two respects emphasized by the Court in *Hartman*.

a. As in the context of retaliatory prosecution, a claim of retaliatory arrest will implicate "a distinct body of highly valuable circumstantial" probable-cause evidence that is "apt to prove or disprove retaliatory causation." *Hartman*, 547 U.S. at 261; see *Reichle*, 566 U.S. at 668 ("[E]vidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case."). Probable cause is an objective standard, the existence of which generally provides a "legal justification" for an arrest irrespective of the "actual motivations of the individual officers involved." *Whren* v. *United States*, 517 U.S. 806, 812-813 (1996); cf. *Virginia* v. *Moore*, 553 U.S. 164, 171 (2008) (explaining that a warrantless arrest supported by probable cause, even for a "minor" offense, is "constitutionally reasonable" under the Fourth Amendment). As in the case of a criminal prosecution, the existence of probable cause for an arrest provides an objective and independent ground for the challenged action.

"[E]stablishing the existence of probable cause" in a retaliatory-arrest case will therefore "suggest that [the arrest] would have occurred even without a retaliatory motive," whereas demonstrating "that there was no probable cause for the [arrest] will tend to reinforce the retaliation evidence and show that retaliation was the

but-for basis for" the arrest. *Hartman*, 547 U.S. at 261. Moreover, as in retaliatory-prosecution cases, the issue of probable cause is "likely to be raised by some party at some point" in a retaliatory-arrest case, and it would impose little, if any, practical burden to require a plaintiff to demonstrate its absence. *Id.* at 265.

Petitioner contends (Br. 46-47) that requiring a plaintiff in a retaliatory-arrest case to plead and prove the absence of probable cause will present an impractical burden because, unlike the prosecutor in a retaliatory-prosecution case, arresting officers need not specifically identify the crime for which an arrest is being made. Accordingly, petitioner argues, a plaintiff would have to plead and prove the absence of probable cause for any hypothetical crime.

That requirement is neither new nor impractical. A plaintiff already must plead and prove the absence of probable cause to arrest for any crime—including ones not initially relied upon for the arrest—in order to prevail on a Fourth Amendment constitutional tort claim challenging a warrantless arrest. See *Devenpeck* v. *Alford*, 543 U.S. 146, 153-154 (2004). Petitioner offers no reason why that requirement, already commonplace in constitutional tort actions challenging arrests, would be impractically burdensome when the underlying claim of a constitutional violation arises under the First Amendment. Indeed, in addition to his First Amendment retaliatory-arrest claim, petitioner also alleged in his complaint a Fourth Amendment claim under Section 1983 (just as many plaintiffs do) and a false-arrest claim under state law, contending that he was "arrested * * * without probable cause" and "had not committed *any* crime." J.A. 38 (emphasis added); see J.A. 31. Petitioner was required to prove, in connection with those

claims, that his arrest was not supported by probable cause to believe that he had committed any offense. He does not explain why requiring the exact same proof in the context of his First Amendment claim would have been impractical and burdensome.

Petitioner similarly contends (Br. 47-48) that incorporating the absence of probable cause for any offense as an element of a constitutional tort claim based on alleged retaliatory arrest creates a "shifting" target during litigation and prevents plaintiffs from knowing which potential offenses are at issue. That assertion is misplaced. For one thing, a plaintiff bringing such a claim based on his own arrest presumably will be aware of the circumstances that led to that arrest, and thus close familiarity with "the entire criminal code" is not necessary to identify the limited number of offenses that may have been committed. Pet. Br. 47. Petitioner, for example, states no reason why his arrest on a charge of disorderly conduct did not provide a reasonable basis to consider the related (and more specific) offense of disturbing a lawful assembly.

In any event, the Federal Rules of Civil Procedure provide a civil litigant like petitioner with ample opportunities to introduce and contest the introduction of evidence, and to ascertain and respond to his opponent's legal arguments. See, *e.g.*, Fed. R. Civ. P. 12 (notice of defenses), 26 (discovery), 43 (testimony), 51 (jury instructions), 56 (summary judgment). Petitioner does not contend that he lacked timely notice of the City's assertion that probable cause existed for the offense of disturbing a lawful assembly or that he was unfairly limited in his ability to present evidence or arguments to prove otherwise. Indeed, the extensive arguments and

evidence concerning probable cause in this case underscore the fact that, as in retaliatory-prosecution cases, such evidence is readily available in retaliatory-arrest cases. *Hartman*, 547 U.S. at 261.

b. Retaliatory-arrest cases also resemble retaliatory-prosecution cases with regard to the second feature emphasized by the Court in *Hartman*: the complexity of the causal connection between animus and the challenged action. In both types of cases, the retaliation inquiry "is usually more complex than it is in other retaliation cases," thus "support[ing] a requirement that no probable cause be alleged and proven." *Hartman*, 547 U.S. at 261; see *Reichle*, 566 U.S. at 668 (noting that a "tenuous causal connection between the defendant's alleged animus and the plaintiff's injury" exists in retaliatory-arrest and retaliatory-prosecution cases).

i. Retaliatory arrest may involve the same specific complexity present in *Hartman*: a lack of identity between the person alleged to have a retaliatory motive and the official who took the challenged action. See 547 U.S. at 262.[4] Petitioner's case is a good example. Petitioner alleged in his complaint that the members of the City Council, and specifically Councilmember Wade, harbored retaliatory animus against him and induced a police officer to arrest him because of that animus. See, *e.g.*, J.A. 26, 31. As petitioner acknowledged below, it is "undisputed" that the officer who arrested him "had no animus against [petitioner]." Pet. C.A. Br. 35; see *ibid.*

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[4] See, *e.g.*, *Archer* v. *Chisholm*, 870 F.3d 603, 611, 618-619 (7th Cir. 2017) (allegation that local officials' retaliatory animus against plaintiff induced police officers' decision to arrest); *Beck* v. *City of Upland*, 527 F.3d 853, 868-869 (9th Cir. 2008) (same); *Curley* v. *Village of Suffern*, 268 F.3d 65, 68, 72-73 (2d Cir. 2001) (same).

("[I]t was Councilwoman Wade who had the retaliatory animus.").

If petitioner had brought a retaliatory-*prosecution* claim asserting that the councilmember's allegedly retaliatory animus ultimately induced a prosecutor to bring criminal charges against him, *Hartman* would have required petitioner to plead and prove the absence of probable cause as a means of bridging the causal gap between the councilmember's animus and the prosecutor's action. It would be incongruous to permit petitioner to proceed on a retaliatory-*arrest* claim similarly premised on the councilmember's alleged retaliatory animus and the injurious actions of another person (here, the arresting officer) without any need to demonstrate the absence of probable cause in order to bridge that same causal gap. In both circumstances, one person's injurious action is said to have been induced by another person's retaliatory animus, and evidence of probable cause provides an objective screen for determining whether but-for causation likely exists.

Petitioner contends (Br. 40, 43) that retaliatory-prosecution claims are "unique" in their causal complexity because prosecutors are absolutely immune from liability for their prosecutorial decisions, whereas police officers receive only qualified immunity for their decisions to arrest. But *Hartman*'s probable-cause requirement did not turn on prosecutorial immunity. Rather, the Court explained that its rule was intended to address the unusually complex questions that arise when plaintiffs allege a "causal connection * * * between the retaliatory animus of one person and * * * the action of another." 547 U.S. at 262. Prosecutorial immunity explains why that causal gap arises in the context of a retaliatory-prosecution claim, but the same gap can and

does arise for other reasons in the context of an arrest, as this case demonstrates. This case thus presents the same complex question of causation that faced the Court in *Hartman*.

Petitioner further notes (Br. 42) that a "presumption of regularity" attaches to prosecutorial decisions but not to arrests. As this Court explained in *Hartman*, that presumption provides an "added" reason to require proof of a lack of probable cause in retaliatory-prosecution cases. 547 U.S. at 263. But the absence of such a presumption in cases involving arrests does not diminish the "powerful evidentiary significance" of probable cause in that context. *Id.* at 261. In any event, this Court has held that the existence of probable cause establishes as a matter of law that "the balanc[e] of private and public interests" favors an arrest and that an officer's decision to arrest is "constitutionally reasonable" under the Fourth Amendment. *Moore*, 553 U.S. at 171. The fact that an arrest supported by probable cause is by definition reasonable informs whether a third party's animus induced the officer's decision to arrest, just as the presumption of regularity for prosecutions supported by probable cause informs whether a third party's animus induced a prosecutor's decision to pursue criminal charges.

ii. As petitioner correctly notes (Br. 43), retaliatory-arrest cases need not involve third parties. But even where only a single officer's animus and arrest are at issue, the causation inquiry will still "usually [be] more complex than it is in other retaliation cases." *Hartman*, 547 U.S. at 261. Unlike in contexts where speech is not relevant to government decisionmaking, and thus proof

of a but-for causal relationship between speech and adverse action establishes unlawful retaliation,[5] a criminal suspect's expressive activity may be an entirely legitimate, or even necessary, factor for the officer to consider in deciding whether to make an arrest. "Like retaliatory prosecution cases, then, the connection between alleged animus and injury may be weakened in the arrest context by a police officer's wholly legitimate consideration of speech." *Reichle*, 566 U.S. at 668.

Speech may, for example, provide evidence of a crime and thus bear directly on the probable cause determination. See, *e.g.*, *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (considering suspect's statements, including some that were constitutionally protected, in addressing probable cause to arrest him for threatening the President); *Wayte* v. *United States*, 470 U.S. 598, 612-613 (1985) (holding that protest letters sent to Selective Service "provided strong, perhaps conclusive evidence" of an element of the criminal offense of failing to register for the draft). The same may be true where a suspect's statements, though not directly implicating him in a crime, support an inference that he is or has engaged in criminal conduct. See *District of Columbia* v. *Wesby*, No. 15-1485, slip op. 10 (Jan. 22, 2018) (explaining that "untruthful and evasive" answers to police questioning "suggest[] a guilty mind" and may support probable cause) (citation omitted).

Even if probable cause otherwise exists, expressive activity may be relevant to an officer's decision whether

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[5] See, *e.g.*, *Board of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 677-680 (1996) (contract termination); *Rankin* v. *McPherson*, 483 U.S. 378, 383-384 (1987) (termination or denial of public employment); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (denial or withholding of public benefits).

to exercise her discretion to make an arrest. See Resp. Br. 19-21 (collecting examples). Officers may properly conclude, for example, that an individual who physically touches a public official after making critical comments about the official's positions is more likely to pose a threat than a person who made supportive or neutral comments. See *Reichle*, 566 U.S. at 661; see also *id.* at 671 (Ginsburg, J., concurring in the judgment) ("Officers assigned to protect public officials * * * [may] rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge."). Similarly, when a person fails to heed a request to yield the floor of a city council meeting, an officer could rightly consider the person's past statements indicating his belief that the council is "wag[ing] a campaign" to "silence and discredit" him in deciding whether he is likely to persist in efforts to disrupt the meeting unless he is arrested. J.A. 22 (petitioner's complaint). The difficulties that judges and juries inevitably would face in attempting to distinguish permissible consideration of speech from retaliation in the context of an arrest provide further support for applying *Hartman*'s reasoning to retaliatory-arrest cases.[6]

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[6] A police officer's ability to permissibly consider speech in deciding whether to arrest also distinguishes claims of retaliatory arrest in violation of the First Amendment from equal-protection claims under the Fifth or Fourteenth Amendment. See Pet. Br. 30. This Court has noted that although an officer's subjective motivation is irrelevant to whether an arrest supported by probable cause is lawful under the Fourth Amendment, equal-protection principles would still "prohibit[] selective enforcement of the law based on considerations such as race" in similar circumstances. *Whren*, 517 U.S. at 813. But that observation "does not indicate * * * that an arrest supported by probable cause could nonetheless violate the First

c. As in *Hartman*, the complex questions of causation inherent in claims of retaliatory arrest "should be addressed specifically [by] defining the elements of the tort" to require the absence of probable cause. 547 U.S. at 265. That element provides the judge and jury with a consistent, objective standard for determining whether the requirements for relief on a claim of retaliation are met. Without that objective screen, the causal complexities inherent in retaliatory-arrest cases and the challenges they pose for the factfinder will create significant uncertainty in each case. Cf. Resp. Br. 12-15 (describing the importance of objective standards for police conduct).

As this Court has recognized, "potentially serious problem[s]" arise from subjective-intent standards in constitutional-tort litigation because "an official's state of mind is 'easy to allege and hard to disprove,'" *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998) (citation omitted), and "questions of subjective intent so rarely can be decided by summary judgment," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982). An officer's honest admission that expressive activity played a role in his arrest decision could easily—and unfairly—be used against him. Conversely, an officer may be improperly discouraged from arresting a suspect who has engaged

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Amendment," *Reichle*, 566 U.S. at 665 n.5, much less that it could give rise to damages liability in a tort action for retaliatory arrest. Unlike expressive activity, immutable characteristics such as race will "seldom provide a relevant basis for disparate treatment." *Fisher* v. *University of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) (citation omitted). And an equal-protection claim based on such disparate treatment already includes a stringent objective screen, requiring detailed proof that the government in fact treated similarly situated people differently. See *United States* v. *Armstrong*, 517 U.S. 456, 458 (1996).

in protected speech, notwithstanding the existence of probable cause, out of fear that an arrest will result in drawn-out litigation and personal liability.

Those are not idle concerns: as respondent explains (Br. 23-31), retaliation is easily alleged in virtually any case where police officers make an arrest after observing provocative speech, and federal courts have repeatedly found that those claims present disputed factual issues that must be tried. Requiring a plaintiff to prove a lack of probable cause would help resolve those concerns by conditioning liability on an objective principle that is already universally applied in the context of arrests, thus providing appropriate protection against the "social costs" of unnecessarily "subjecting public officials to discovery and trial, as well as liability for damages." *Crawford-El*, 523 U.S. at 585.

The Court should make the no-probable-cause requirement a rule for all retaliatory-arrest cases, including those that arise in circumstances involving more straightforward issues of causation, rather than invite difficult line-drawing problems about which cases are sufficiently complex to require such a showing. See *Hartman*, 547 U.S. at 261, 264 & n.10. Unlike in other retaliation contexts, probable cause is a legal issue that will be of critical importance to "practically all" claims of retaliatory arrest given the strong tendency of that evidence to answer one of the central factual questions in such cases. *Id.* at 265; see *Reichle*, 566 U.S. at 668. Although "showing an absence of probable cause may not be *conclusive*" proof that an arrest was retaliatory, and "showing its presence does not *guarantee*" that retaliatory animus "was not the but-for fact in [an officer's] decision" to arrest, *Hartman*, 547 U.S. at 265 (emphases added), the "powerful" and "highly valuable"

nature of probable- cause evidence in the context of an arrest virtually assures that the issue will need to resolved in every case, *id.* at 261. It therefore "makes sense," as in *Hartman*, to formalize the issue as an element of the tort. *Id.* at 265-266.

B. Analogous Common-Law Torts Support Requiring Proof Of The Absence Of Probable Cause As An Element Of A Retaliatory-Arrest Claim

This case also presents an additional consideration, not present in *Hartman*, that counsels in favor of requiring a plaintiff to plead and prove the absence of probable cause: the common law's reliance on that factor in analogous contexts. This Court has recognized that "over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights," and that those preexisting rules provide valuable guidance in defining the contours of constitutional torts. *Carey* v. *Piphus*, 435 U.S. 247, 257 (1978); see *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 921 (2017) (noting that "[c]ommon-law principles are meant to guide * * * the definition of § 1983 claims"). The Court accordingly acknowledged in *Hartman* that the common law may serve "as a source of inspired examples" in the *Bivens* and Section 1983 contexts. 547 U.S. at 258. In that case, however, the Court found no clear guidance from the common law, observing that "we could debate whether the closer common-law analog to retaliatory prosecution is malicious prosecution (with its no-probable-cause element) or abuse of process (without it)." *Ibid.*

But at least for retaliatory-arrest cases that, like this one, do not involve a warrant, the common-law analogues are much clearer. A warrantless arrest would

not provide the basis for a common-law abuse-of-process claim because it does not involve the subversion of legal "process," which generally is defined to require some sort of interaction with a court. See Restatement (Second) of Torts § 682 (1977) (element of abuse-of-process torts is "us[ing] a legal process"); *Black's Law Dictionary* 1034, 1399 (10th ed. 2014) (defining "legal process" to mean "[a] summons or writ, esp. to appear or respond in court," and defining "criminal process" by reference to a warrant); see also 3 Dan B. Dobbs et al., *The Law of Torts* § 594, at 420-422 (2d ed. 2011) (discussing definition of "process" in context of abuse-of-process tort). Rather, a warrantless arrest might be actionable at common law in one of two ways. First, the arrestee might allege that he was arrested without legal authority, in which case his claim would be for false imprisonment. Restatement §§ 35, 41 (1965), 654 cmt. e (1977); see 1 Dobbs § 41, at 104. Second, the arrestee might allege that even if there was legal authority to arrest him, that authority was invoked maliciously, in which case his claim would be for malicious prosecution. Restatement § 654 cmt. e (1977).

Neither common-law tort would impose damages liability on an officer who made a warrantless arrest based on probable cause. The absence of probable cause is an element of a malicious-prosecution tort. Restatement § 653 (1977); see, *e.g.*, *Hartman*, 547 U.S. at 258; *Heck* v. *Humphrey*, 512 U.S. 477, 485 n.4 (1994). And the presence of probable cause is a defense to a false-imprisonment tort. A defendant in a false-imprisonment case can avoid liability by showing that he made a "privileged" arrest, Restatement § 118 & cmt. b (1965); see 1 Dobbs § 94, at 289-290, and a "peace officer" would be privileged to arrest someone whom he

"reasonably suspects" has committed an offense in his presence. Restatement §§ 114, 119(b)-(c), 121 (1965); see 1 Dobbs § 94, at 291-293 (noting that a warrantless arrest supported by probable cause is privileged).

In a common-law action, therefore, any retaliatory motive that an officer might have in making a warrantless arrest would be irrelevant if probable cause were present. It has long been the rule that "if there was probable cause, an action for malicious prosecution will not lie, although the party who procured the arrest or indictment was actuated by malicious motives." *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 402 (1852); see 3 William Blackstone, *Commentaries on the Laws of England* 127 (1768). And in the false-imprisonment context, "the fact that [an officer] has an ulterior motive * * * does not make the arrest unprivileged" so long as the arrest is made in the course of enforcing the law. Restatement § 127 cmt. a (1965). So, for example, if "A, a traffic officer, arrests B for driving at the rate of 20 miles an hour through a town in which the rate of speed is fixed by an ordinance at 15 miles an hour," the arrest is privileged (and thus no false-imprisonment liability attaches), even if A made the arrest "because B was a personal enemy, or because B had previously reported him for his failure to arrest persons driving at 25 miles an hour." *Id.* § 127 cmt. a, illus. 1.

Under petitioner's proposed rule, however, a plaintiff in those circumstances could impose liability on the officer by couching his claim in constitutional terms. There is no reason why the definition of the constitutional tort should so sharply depart from the common law's guidance. Particularly given the central significance of probable cause in resolving questions about what caused an arrest, it makes sense to adopt a rule in

this case that, consistent with *Hartman*, incorporates probable cause as an element of the claim. The same practical considerations that have informed the development of the common law are equally present here. See Resp. Br. 17-19. And requiring consideration of probable cause at the earliest possible stage of the case protects innocent officers from the serious burdens of discovery and trial. See *Crawford-El*, 523 U.S. at 585.

C. A Damages Remedy Is Not Essential To Deter Police Officers From Making Retaliatory Arrests Supported By Probable Cause

Petitioner argues (Br. 22-23, 26) that extending *Hartman* to the arrest context would provide inadequate protection for speech because police might use their authority to arrest for minor offenses, see *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001), in order to retaliate against speakers with unpopular views even in circumstances where probable cause for some offense exists. But that concern depends on the mistaken view that only a private damages remedy will deter governmental officials from making retaliatory arrests. Federal, state, and local governments have other civil and criminal enforcement tools available to guard against potential abuses. As long as the existence of probable cause is recognized as a limitation on a retaliatory-arrest tort action, and not the First Amendment itself, petitioner's concern is substantially mitigated.

1. The First Amendment confers a "general right to be free from retaliation for one's speech." *Reichle*, 566 U.S. at 665; see *Hartman*, 547 U.S. at 256. But constitutional tort actions need not provide a remedy for every violation of that right. For example, in the context of suits against federal officers under *Bivens* v. *Six*

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Court has held that a judicially created damages remedy is not appropriate for every constitutional violation—indeed, "in most instances" this Court has "found a *Bivens* remedy unjustified." *Wilkie*, 551 U.S. at 550; see, *e.g.*, *Bush* v. *Lucas*, 462 U.S. 367, 390 (1983) (declining to recognize a damages remedy under *Bivens* for violation of a federal employee's First Amendment rights). The Court has likewise interpreted Section 1983 to authorize damages only for acts found to "violat[e] * * * constitutional rights *and to have caused compensable injury*." *Carey*, 435 U.S. at 255 (quoting *Wood* v. *Strickland*, 420 U.S. 308, 319 (1975)). The Court has explained that "the elements of, and rules associated with, an action seeking damages" for such injuries under Section 1983 may reflect practical considerations and limitations that preclude recovery even if "'the specific constitutional right' at issue" has been violated. *Manuel*, 137 S. Ct. at 920 (citation omitted); see *id.* at 920-921 (noting that limitations on damages actions for malicious prosecution may preclude recovery for Fourth Amendment violations in some circumstances).

Although the Court in *Hartman* did not expressly decide whether its no-probable-cause requirement was a limitation on the scope of the First Amendment, see *Reichle*, 566 U.S. at 669 n.6, it clearly conceived of that requirement as restraining a plaintiff's ability to obtain damages in a constitutional tort suit alleging retaliatory prosecution. The Court stated that its "holding d[id] not go beyond a definition of an element of the tort," 547 U.S. at 257 n.5, and it relied heavily on the practical difficulties in pleading and proving that tort in determining that it "makes sense to require" the absence of

probable cause "as an element of a plaintiff's case," *id.* at 265-266; see *id.* at 265 (explaining that "the complexity of causation in a claim that prosecution was induced by an official bent on retaliation should be addressed specifically in defining the elements of the tort"). The Court observed that the presence or absence of probable cause is not perfect evidence of whether a constitutional violation occurred, see *id.* at 265 ("[S]howing an absence of probable cause may not be conclusive that the inducement succeeded, and showing its presence does not guarantee that inducement was not the but-for fact in a prosecutor's decision."), but is sufficiently probative of causation to warrant requiring that showing as a prerequisite to recovering damages, *ibid.* Similarly, in this case, the Court should hold that the elements of a retaliatory-arrest tort require a plaintiff to establish the absence of probable cause.

2. Recognizing the absence of probable cause as an element of a retaliatory-arrest tort, and not as a limit on the scope of the First Amendment, mitigates petitioner's concerns about the possibility that officers may engage in retaliatory arrests notwithstanding the existence of probable cause. The United States, for example, may prosecute officers who willfully violate individuals' constitutional rights under color of law (or who conspire to do so) by subjecting them to arrest in retaliation for their protected speech, even if those arrests are supported by probable cause. See 18 U.S.C. 241, 242. The United States may also bring civil actions against state and local law-enforcement agencies under 34 U.S.C. 12601 to remedy a pattern or practice of retaliatory arrests by law enforcement officers, including in circumstances where probable cause may have existed for in-

dividual arrests. Those tools would have obvious application if, as petitioner imagines, a municipality were to implement "a formal policy directing its police department to enforce a jaywalking statute against only those jaywalkers who are engaged in particular First Amendment-protected expression." Br. 26.[7]

Governmental enforcement actions under the statutes identified above are appropriately limited by proof requirements that do not exist in the context of individual tort suits under Section 1983 or *Bivens*. Criminal prosecutions under 18 U.S.C. 242 require the government to establish willfulness and to prove unlawful retaliation beyond a reasonable doubt. A pattern-or-practice claim requires the government to show a "systemwide" violation of constitutional rights, and not simply "isolated" or "sporadic" acts. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977) (discussing pattern or practice of employment

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[7] Several States have statutes that may authorize criminal prosecution of police officers who violate individuals' rights under color of law. See, *e.g.*, Ark. Code Ann. § 5-52-107 (Supp. 2017); Colo. Rev. Stat. § 18-8-403 (2017); Del. Code Ann. tit. 11, § 1211 (2015); 720 Ill. Comp. Stat. Ann. 5/33-3 (West Supp. 2017); Iowa Code Ann. § 721.2(3) (West 2013); Ky. Rev. Stat. Ann. §§ 522.020, 522.030 (LexisNexis 2014); Minn. Stat. Ann. § 609.43 (West 2009); Mont. Code Ann. § 45-7-401 (2015); Neb. Rev. Stat. Ann. § 28-926 (LexisNexis 2015); N.H. Rev. Stat. Ann. § 643:1 (LexisNexis 2015); N.J. Stat. Ann. § 2C:30-2 (West 2016); N.Y. Penal Law § 195.00 (McKinney 2010); N.D. Cent. Code § 12.1-14-05 (2012); 18 Pa. Cons. Stat. Ann. § 5301 (West 2015); Tenn. Code Ann. § 39-16-403 (2014); Tex. Penal Code Ann. § 39.02 (West 2016); Utah Code Ann. § 76-8-201 (LexisNexis 2017); Wash. Rev. Code Ann. § 9A.80.010 (West 2015). Some States further authorize the state attorney general to bring civil suits against police departments for patterns or practices that violate individual rights. See Cal. Civ. Code § 52.3 (West 2007); Fla. Stat. Ann. § 760.021 (West 2014).

discrimination). And the appropriate exercise of prosecutorial discretion ensures that the public interest will be weighed in determining whether a civil or criminal action is appropriate under the circumstances.

Those factors guard against unwarranted intrusions on the ability of police officers to make arrests while ensuring that, in the limited class of cases where both probable cause and retaliatory motive exist, constitutional rights are protected. The absence of those factors in private damages suits, however, underscores the need for the objective screen provided by *Hartman*'s no-probable-cause requirement. Cf. *Maryland* v. *Pringle*, 540 U.S. 366, 370 (2003) ("The long-prevailing standard of probable cause protects citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime, while giving fair leeway for enforcing the law in the community's protection.") (citation and internal quotation marks omitted).

Accordingly, while a no-probable-cause rule is an appropriate element in a retaliatory-arrest tort action to address the challenges that arise from litigation in that context, it need not license retaliatory arrests supported by probable cause. Governmental civil and criminal enforcement continues to be an important backstop for safeguarding constitutional rights even where limitations on private causes of action for damages do not permit individual tort claims.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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* The Solicitor General is recused in this case.

No. 17-21

In The Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE STATE OF ALASKA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that probable cause defeats a First Amendment retaliatory-prosecution claim as a matter of law. Does probable cause likewise defeat a First Amendment retaliatory-arrest claim?

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INTERESTS OF AMICUS CURIAE STATE OF ALASKA

The State of Alaska protects its citizens and enforces its laws through its statewide law enforcement agency, the Alaska State Troopers. Over 300 troopers investigate crimes, patrol highways, and maintain public order in some of the smallest, most remote communities in the nation. Alaska has a paramount interest in ensuring that its officers are able to vigorously protect the public without the threat of harassing litigation from unfounded claims of First Amendment retaliation under 42 U.S.C. § 1983. The State also has a concrete financial interest in minimizing its troopers' exposure to liability because it indemnifies them for unfavorable judgments based on actions within the scope of their employment.

The State's interests are far from theoretical: the outcome of this case will directly impact a retaliatory-arrest claim pending against two Alaska troopers after a recent decision by the Ninth Circuit Court of Appeals, *Bartlett v. Nieves*, No. 16-35631, 2017 WL 4712440 (9th Cir. Oct. 20, 2017).[1] In that case, the Court of Appeals recognized the existence of probable cause to arrest the claimant for assault but

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[1] The troopers in that case, who are represented by state attorneys, will be filing a petition for a writ of certiorari to the Ninth Circuit on or before February 19, 2018. They will ask the Court to grant the petition and hold that case so it can be decided consistently with this case. The Ninth Circuit has stayed its mandate pending the filing of the petition for certiorari. *Bartlett*, No. 16-35631, Dkt. 47.

nonetheless reversed the district court's grant of summary judgment to the arresting officers. *Id.* at *1, 2. The State thus has an immediate interest in protecting these troopers from trial by establishing that the existence of probable cause to arrest forecloses a retaliatory-arrest claim.

SUMMARY OF ARGUMENT

A plaintiff asserting a claim of retaliatory arrest in violation of the First Amendment should be required to plead and prove that the arrest was not supported by probable cause. Without this rule, law enforcement officers are vulnerable to meritless retaliatory-arrest claims, "at a cost not only to the defendant officials, but to society as a whole." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Exposing officers to these difficult-to-defend suits both burdens them with the demands of increased litigation and threatens to deter them from making arrests that are supported by probable cause and important to protect public safety.

Fane Lozman's unique story obscures how a ruling in his favor would hinder law enforcement officers in routine community policing situations. A far more representative claim of retaliatory arrest is the Ninth Circuit's recent decision in *Bartlett v. Nieves*, No. 16-35631, 2017 WL 4712440 (9th Cir. Oct. 20, 2017), which plainly illustrates the problems of allowing these claims to proceed despite the existence of probable cause. The Ninth Circuit panel in *Bartlett* ruled that

troopers patrolling a Bacchanalian snowmobile racing festival in the Alaskan wilds had probable cause to arrest a man for assault, disorderly conduct, and harassment after he accosted them during an investigation. *Id.* at *2. But in the Ninth Circuit, the existence of probable cause for an arrest does not bar a claim that the arrest was retaliatory. *Id.* (citing *Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013)). The officers now face trial on a dispute over their subjective intent, despite the objective reasonableness of arresting a drunk, belligerent man who seemed poised to assault them. *Id.*

The *Bartlett* decision shows how easily almost any routine arrest can boomerang into a First Amendment retaliation claim if the arrestee expresses irritation when confronted by police. It also shows how difficult it is to defeat even meritless claims of retaliatory arrest. And it shows the dilemma that police will face if this Court rules in Lozman's favor. When a person whom police reasonably believe has committed a crime engages in some kind of protected expression – even just an abusive tirade – officers will have to decide whether the public safety benefit of arresting him is worth the personal risk of being sued for retaliatory arrest. Ruling that a retaliatory-arrest claim is barred if the arrest was supported by probable cause will ensure that officers do not have to make that choice.

ARGUMENT

Evidence of probable cause is highly probative of the key issue in most retaliatory-arrest claims: whether retaliation against protected speech was the "but-for cause" of the arrest. *Hartman v. Moore*, 547 U.S. 250, 256, 265 (2006). Requiring a plaintiff to plead and prove that the arrest lacked probable cause thus effectively filters out meritless claims. *See id.* at 261 ("[E]stablishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive."). The Ninth Circuit's decision in *Bartlett v. Nieves*, No. 16-35631, 2017 WL 4712440 (9th Cir. Oct. 20, 2017), and other cases illustrate how, without this protection, police officers' vulnerability to meritless retaliatory-arrest claims undermines their ability to protect the public.

To prove a claim of First Amendment retaliation under 42 U.S.C. § 1983, a plaintiff must show that retaliation against his protected speech was the "but-for cause" of the official action against him. *Hartman*, 547 U.S. at 256 (citing *Crawford-El v. Britton*, 523 U.S. 574, 593 (1998); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). In *Hartman v. Moore*, the Court ruled that a plaintiff claiming that he was prosecuted in retaliation for his speech must plead and prove that there was no probable cause for the prosecution. 547 U.S. at 266-67. This rule is justified by the complexity of showing a causal connection between the alleged retaliatory motive and the prosecution, and by the "powerful evidentiary significance" of probable cause in proving that connection "in practically all

cases." *Id.* at 261, 265. Given the "close relationship" between claims of retaliatory prosecution and retaliatory arrest, these reasons apply with similar force to the latter. *See Reichle v. Howards*, 566 U.S. 658, 670 (2012). And as Respondent City of Riviera Beach explains, requiring plaintiffs to plead and prove lack of probable cause when making retaliatory-arrest claims is consistent with both the claim's common law antecedents and the Court's preference for objective tests in adjudicating constitutional torts.

Requiring plaintiffs asserting retaliatory-arrest claims to show lack of probable cause serves another salutary function: protecting police officers from unfounded claims. "Because an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El*, 523 U.S. at 584-85. These claims are also harder to defend against at trial. Although other § 1983 claims are usually resolved on the basis of extrinsic, verifiable evidence, retaliatory-arrest claims will often turn on the credibility of the officer's own testimony about his subjective intent. Not only will officers who act in good faith have difficulty avoiding trial, they will have far less confidence of being vindicated there.

These officers will get little protection from qualified immunity. Qualified immunity shields officers from liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v.*

Fitzgerald, 457 U.S. 800, 818 (1982). If the Court recognizes a right to be free from retaliatory arrest regardless of probable cause, then a plaintiff will be able to negate qualified immunity simply by alleging some fact suggesting retaliatory motive. So while the Court has stressed the importance of protecting government officials who act in good faith not only from monetary liability but also from the costs of being forced to stand trial, *id.* at 816 (warning of "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"), even police officers who act in good faith will not enjoy this protection when faced with retaliatory-arrest claims.

Requiring plaintiffs to plead and prove probable cause is thus an essential protection against unfounded retaliatory-arrest claims. Litigation in the Ninth Circuit, which has rejected this rule, *Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013), illustrates precisely why the rule is needed to ensure police are not deterred from vigorously protecting public safety.

I. Retaliatory-arrest claims commonly arise out of everyday police encounters.

When weighing the costs and benefits of a probable-cause requirement, the Court should take into account the day-to-day circumstances that officers encounter and that commonly spur retaliatory-arrest claims against them. It is unusual to be arrested at a

city council meeting, and some of Lozman's hypothetical arrests are far-fetched indeed – it seems doubtful that someone has ever been subject to arrest, retaliatory or otherwise, for shallowly burying a diseased hamster. Pet. Br. 23. Retaliatory-arrest claims are much more likely to arise out of routine community policing encounters.

The *Bartlett* decision presents a far more typical scenario and illustrates the ease with which anyone who criticizes, insults, or protests officers can assert a colorable retaliatory-arrest claim. Russell Bartlett was arrested at Arctic Man, an extreme ski and snowmobile racing event in the remote Hoodoo Mountains of Alaska that features large crowds and abundant alcohol use. *Bartlett v. Nieves*, No. 4:15-cv-00004-SLG, 2016 WL 3702952, *1 (D. Alaska July 7, 2016), affirmed in part, reversed in part by *Bartlett v. Nieves*, 2017 WL 4712440 at *1. While investigating underage drinking at a party at 1:30 am, Alaska State Trooper Luis Nieves attempted to speak to Bartlett. *Bartlett*, 2016 WL 3702952 at *1. Bartlett declined to speak to Trooper Nieves, so Nieves left Bartlett and headed toward the trooper vehicle. Bartlett then marched up to Trooper Bruce Weight, who was interviewing a minor, and loudly challenged the Trooper's authority to speak with the young man. *Id.* The district court found that video recording of the incident showed "Trooper Weight, Mr. Bartlett, and the minor standing very close together exchanging words" and that "Bartlett's right hand was at roughly shoulder height within inches of

Trooper Weight's face."[2] *Id.* at *2. The 5'9", 240-pound Bartlett, who at the time of the incident was too intoxicated to drive, *Bartlett*, No. 16-35631, Dkt. 23 at 43, 46, later maintained that his close proximity to Trooper Weight and loud voice were appropriate given the volume of music at the party, but Trooper Weight viewed Bartlett's "escalating voice, his look of anger, [and] his body language" as "hostile" "pre-assault indicators." *Id.* Dkt. 8-1 at 92.

To create a safe space for himself, Trooper Weight placed his open palms on Bartlett's chest and pushed him back. *Bartlett*, 2016 WL 3702952 at *1; No. 16-35631, Dkt. 23 at 39. Trooper Nieves, believing that Bartlett posed a danger to Weight, ran to help, and both officers restrained and then arrested Bartlett. No. 16-35631, Dkt. 8-1 at 72-73. He was released a few hours later without injury. *Id.* Dkt. 23 at 42, 55. Bartlett was charged with disorderly conduct and resisting arrest. *Bartlett*, 2016 WL 3702952 at *3. The prosecution later dismissed the case, *id.* at *3, but the assigned prosecutor stated to the district court that he believed probable cause existed to charge Bartlett for disorderly conduct, resisting arrest, and assault. No. 16-35631 Dkt. 8-1 at 113.

Bartlett sued Troopers Weight and Nieves, asserting several claims under § 1983, including retaliatory arrest in violation of the First Amendment. The

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[2] The camera's view of Bartlett's hand was partially blocked, so the video does not show, and the parties dispute, whether Bartlett raised his hand to Weight's face before the Trooper pushed him back or after.

district court granted summary judgment in favor of the troopers on all claims, *Bartlett*, 2016 WL 3702952 at *4-12, and the Ninth Circuit affirmed on all claims except for retaliatory arrest, *Bartlett*, 2017 WL 4712440 at *1-2. The appellate court ruled that the troopers had probable cause to arrest Bartlett for assault, disorderly conduct, harassment, and resisting arrest. *Id.* Nevertheless, the court reiterated its earlier holding in *Ford v. City of Yakima* that probable cause for an arrest does not bar a plaintiff's claim that the arrest was retaliatory in violation of the First Amendment. *Id.* at *2 (citing *Ford*, 706 F.3d at 1196). The court found that a jury might be persuaded that Bartlett was arrested not for his harassing and belligerent conduct, but because of his earlier refusal to assist with the investigation. *Id.* The court's conclusion was based solely on Bartlett's uncorroborated claim that Trooper Nieves said after the arrest, "Bet you wish you would have talked to me earlier." The court thus ruled that summary judgment should not have been granted. *Id.*

The *Bartlett* case illustrates how almost any arrest can transform into a retaliatory-arrest claim – and promptly subject an officer to the burdens of litigation – if the suspect engages in some kind of expressive activity, even just personal insults. *See City of Houston v. Hill*, 482 U.S. 451, 461 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."). The *Bartlett* case is not an outlier. Other retaliatory-arrest claims in the Ninth Circuit have originated in arrests for

disorderly conduct, assault, traffic stops, and other situations requiring police to act quickly in the interest of public safety:

- A man ejected from a professional football game for intoxication and arrested after attempting to re-enter the stadium alleged that his arrest was in retaliation for identifying himself as an off-duty officer and asking police to "take it easy," *Holguin v. City of San Diego*, 135 F. Supp. 3d 1151, 1162-63 (S.D. Cal. 2015) (granting summary judgment in favor of officers on retaliation claim);

- A group arrested after an evening of drinking that culminated in a physical altercation with police officers who were escorting them from a comedy club that had ejected them alleged that they were arrested in retaliation for one man's statement to police that "even [his] father could kick their asses," *Engman v. City of Ontario*, No. ECDV 10-284 CAS (PLAx), 2011 WL 13134048, *1-2, 10 (C.D. Cal. May 23, 2011) (denying summary judgment on retaliation claim);

- A woman arrested for criminal trespass and resisting arrest when she refused to vacate her camp on government property after being served with a court order of ejectment alleged that her arrest was in retaliation for verbally challenging an officer's instructions to pack her belongings and leave, *Morgan v. County of Hawaii*,

No. CV 14-00551 SOM-BMK, 2016 WL 1254222, *5, 18-20 (D. Haw. Mar. 29, 2016) (awarding qualified immunity to defendants on retaliation claim);

- A man arrested after trying to operate a vehicle while visibly intoxicated alleged that his arrest was in retaliation for his complaints about the officer's actions, *Dell'Orto v. Stark*, 123 F. App'x 761, 762-63 (9th Cir. 2005) (reversing denial of officer's motion for summary judgment);

- A man arrested for assaulting a minor whom he had lured to his home by sending a text message from his daughter's phone alleged that he was arrested in retaliation for having previously complained to police about the minor's relationship with his daughter, *Smith v. City of Payson*, No. CIV 10-2650 PHX MEA, 2012 WL 12881975 (D. Ariz. 2012) (granting summary judgment in favor of officers), *aff'd*, 585 F. App'x 421 (9th Cir. 2014);

- A man whom officers subjected to a pat-down search after observing him reach under the seat of his car during a traffic stop alleged that the search was in retaliation for his cursing at officers and accusing them of "just f**king with [him]," *White v. County of San Bernardino*, 503 F. App'x 551 (9th Cir. 2013) (affirming summary judgment on retaliation claim).

As these cases show, the Court's ruling in this case will impact officers on the front lines of public safety in city streets, in remote villages, and at large public events. These officers frequently encounter intoxicated and verbally combative suspects, and they must make split-second decisions in volatile circumstances. Exposing officers to retaliation claims for arrests that were supported by probable cause risks eroding their willingness to make lawful arrests required to protect public safety.

II. Without a requirement to show that probable cause was lacking, weak retaliatory-arrest claims can easily survive summary judgment.

The crux of most retaliatory-arrest claims will be a dispute over whether the arrest was motivated by retaliatory animus. "Because an official's state of mind is easy to allege and hard to disprove," *Crawford-El*, 523 U.S. at 584-85 (internal quotation marks omitted), an officer cannot easily establish for summary judgment that an arrest was not retaliatory.

The *Bartlett* decision shows just how easy it is for weak retaliatory-arrest claims to survive summary judgment. The court reversed the grant of summary judgment based solely on Bartlett's uncorroborated assertion that Trooper Nieves said something suggesting retaliatory motive. *Bartlett*, 2017 WL 4712440 at *2. Thus in the Ninth Circuit, a doubtful allegation about an officer's subjective intent defeats summary

judgment – even though the existence of probable cause to arrest for a crime as serious as assault strongly suggests that retaliatory motive was not the "but-for" cause for the arrest. Again, the *Bartlett* decision is not an outlier. In a recent case, summary judgment was denied on a retaliatory-arrest claim even though the plaintiff was *convicted* of the crime he was arrested for, based solely on the plaintiff's disputed assertion that officers made statements indicating retaliatory motive. *Mihailovici v. Snyder*, No. 3:15-cv-01675 MO, 2017 WL 1508180, *5-6 (D. Or. Apr. 25, 2017). Without the need to show the challenged arrest lacked probable cause, plaintiffs can expose officers to the burdens of trial on even the weakest retaliatory-arrest claims.

Apparently aware of this problem, the Ninth Circuit has tried to temper its rejection of the probable-cause element in order to "protect[] government officials from the disruption caused by unfounded claims." *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008). Because "[t]here is almost always a weak inference of retaliation whenever a plaintiff and a defendant have had previous negative interactions," the court has articulated a rule of thumb to guide the district courts: cases with "very strong evidence of probable cause and very weak evidence of a retaliatory motive" should ordinarily result in summary judgment. *Id.* (cited in *Maidhof v. Celaya*, 641 F. App'x 734, 735 (9th Cir. 2016); *White*, 503 F. App'x at 553).

But that approach offers inadequate protection against meritless claims. The imprecise weighing it

requires will necessarily reflect the diverse perspectives of individual judges about what evidence of probable cause counts as "very strong," what evidence of retaliatory motive counts as "very weak," and how to balance those categories of evidence against one another. *E.g.*, *compare Maidhof*, 641 F. App'x at 736-37 (affirming summary judgment because there was probable cause for arrest and "evidence of retaliatory intent is weak"), *with id.* at 737 (Rawlinson, J., dissenting) (finding sufficient "circumstantial evidence of retaliation" to preclude summary judgment); *compare White*, 503 F. App'x at 553 (affirming summary judgment because evidence of retaliatory motive for pat-down search was "weak"), *with id.* at 555 (Graber, J., dissenting) (maintaining there was sufficient evidence for fact-finder to conclude that pat-down search was motivated by plaintiff's insult). The standard invites inconsistent results, and thus provides only scattershot protection against unfounded claims. Nor is it an effective screen for claims by unscrupulous plaintiffs, who can defeat summary judgment by claiming the officer made a damning statement, with no need to corroborate it.

In fact, relieving plaintiffs from the need to show lack of probable cause makes retaliatory-arrest claims uniquely easy to assert compared to other section 1983 claims against law enforcement. Probable cause is an absolute bar to Fourth Amendment claims of false arrest, regardless of the arresting officer's motivation, *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004), and an absolute bar to claims of retaliatory prosecution as

well, *Hartman*, 547 U.S. at 265-66. And although probable cause does not bar claims of discriminatory arrest in violation of the Fourteenth Amendment, these claims require a "demanding" objective showing: at least some evidence that similarly situated people of another class were treated differently. *See United States v. Armstrong*, 517 U.S. 456, 465, 469 (1996) (holding that claimant asserting discriminatory prosecution "must show that similarly situated individuals of a different race were not prosecuted"); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533-34 (6th Cir. 2002) (extending *Armstrong* rule to law enforcement actions generally); *Chavez v. Illinois State Police*, 251 F.3d 612, 636 (7th Cir. 2001) (applying *Armstrong* rule to claim of discriminatory stops, detentions, and searches); *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996) (analyzing discriminatory arrest claim under *Armstrong* framework); *Richards v. City of Los Angeles*, 261 F. App'x 63, 65-66 (9th Cir. 2007) (characterizing claims of discriminatory inspections, raids, and arrests as "selective enforcement" claim requiring plaintiff to show similarly situated class). The need to show unequal treatment of similarly situated persons makes it hard to allege, and easy to disprove, unfounded claims of discriminatory arrest.

Not so for claims of retaliatory arrest. The ease of asserting these claims, and the difficulty of defending against them, justifies a rule that the plaintiff must plead and prove the absence of probable cause for the arrest.

III. Exposing officers to meritless retaliatory-arrest claims risks undercutting their performance and undermining public safety.

Police officers working a beat should not hesitate when forced to make quick decisions about how to protect the public and themselves. But permitting retaliatory-arrest claims to proceed even though the challenged arrest was supported by probable cause will place officers in the difficult position of weighing public safety against the risk of personal liability.

The *Bartlett* case again offers a useful illustration of this dilemma. Troopers Nieves and Weight were attempting to investigate underage drinking at a remote outdoor festival when they encountered Bartlett. *Bartlett*, 2016 WL 3702952 at *1. Bartlett not only interfered with their investigation; he also appeared intoxicated and aggressive. No. 16-35631, Dkt. 8-1 at 92, Dkt. 23 at 43. Because his conduct did not amount to a major crime, the troopers could have used their discretion not to arrest. And had they known that arresting him would spiral into a trial on a retaliatory-arrest claim, they might have declined to do so. Yet that would have meant leaving a drunk, belligerent man at a remote outdoor party with minors in the middle of the night. That is not the kind of decision that society or the courts should encourage officers to make. If the Court rules that probable cause does not bar retaliatory-arrest claims, this dilemma is likely to arise in countless routine encounters involving disorderly conduct, trespass, or other minor offenses that sometimes pose a danger to public safety.

When it decided *Hartman*, the Court did not consider the volume of retaliatory-prosecution litigation overwhelming. *Hartman*, 547 U.S. at 259. But retaliatory-arrest claims are a different story. In the twenty-five years preceding *Hartman*, the Court found fewer than two dozen damages actions for retaliatory prosecution that had come before all the courts of appeals. In contrast, more retaliatory-arrest claims have come before the Ninth Circuit alone in just the eleven years since *Hartman* was decided. *Bartlett*, 2017 WL 4712440 at *1; *Vohra v. City of Placentia*, 683 F. App'x 564, 567 (9th Cir. 2017); *Reed v. Lieurance*, 863 F.3d 1196, 1212 (9th Cir. 2017) (issuance of misdemeanor citation without arrest); *Sharp v. County of Orange*, 871 F.3d 901, 919 (9th Cir. 2017); *Maidhof*, 641 F. App'x at 735; *Picray v. Duffitt*, 652 F. App'x 497, 498 (9th Cir. 2016); *Willes v. Linn County*, 650 F. App'x 444, 444 (9th Cir. 2016); *Nichols v. City of Portland*, 622 F. App'x 679, 679 (9th Cir. 2015); *Adkins v. Limtiaco*, 537 F. App'x 721, 722 (9th Cir. 2013); *Gutierrez v. County of Los Angeles*, 545 F. App'x 701, 701 (9th Cir. 2013); *Jackson v. City of Pittsburg*, 518 F. App'x 518, 520-21 (9th Cir. 2013); *Martin v. Naval Criminal Investigative Serv.*, 539 F. App'x 830, 831 (9th Cir. 2013); *Ford*, 706 F.3d at 1190; *Tarahoui v. Brown*, 539 F. App'x 734, 734 (9th Cir. 2013); *White*, 503 F. App'x at 553; *Blomquist v. Town of Marana*, 501 F. App'x 657, 659 (9th Cir. 2012); *Lacey v. Maricopa County*, 693 F.3d 896, 916-17 (9th Cir. 2012) (en banc); *Dirks v. Grasso*, 449 F. App'x 589, 592 (9th Cir. 2011); *Glair v. City of Los Angeles*, 437 F. App'x 581, 581 (9th Cir. 2011); *Ikei v. City and County of Honolulu*,

441 F. App'x 493, 494 (9th Cir. 2011); *Wilson v. City of San Diego*, 462 F. App'x 683, 683 (9th Cir. 2011); *Kubanyi v. Covey*, 391 F. App'x 620, 621 (9th Cir. 2010); *Ra El v. Crain*, 399 F. App'x 180, 182 (9th Cir. 2010); *Beck v. City of Upland*, 527 F.3d 853, 868-69 (9th Cir. 2008); *Dietrich*, 548 F.3d at 901; *Scallion v. City of Hawthorne*, 280 F. App'x 671, 673 (9th Cir. 2008); *Tarr v. Maricopa County*, 256 F. App'x 71, 73-74 (9th Cir. 2007); *Skoog v. County of Clackamas*, 469 F.3d 1221, 1235 (9th Cir. 2006).

The threat to police officers from unfounded retaliatory-arrest claims is real. To avoid deterring officers from making objectively reasonable arrests that protect public safety, the Court should rule that a plaintiff asserting such a claim must show that the arrest lacked probable cause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,
Petitioner,

v.

THE CITY OF RIVIERA BEACH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE DISTRICT OF COLUMBIA AND THE STATES OF IDAHO, INDIANA, LOUISIANA, MISSISSIPPI, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, UTAH, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that probable cause defeats a First Amendment retaliatory-prosecution claim as a matter of law. Does probable cause likewise defeat a First Amendment retaliatory-arrest claim?

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Office of Community Oriented Policing Servs., U.S. Dep't of Justice, *Community Policing Defined* (2014) 15, 16

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INTEREST OF *AMICI CURIAE*

The ability to enact, administer, and enforce criminal laws is at the heart of a State's sovereignty. Most crimes fall under state, rather than federal, jurisdiction, making law enforcement a primary function for state and local governments. In protecting the safety of their residents, States have a vital interest in ensuring that law enforcement officers can arrest based on probable cause. Where a State has authorized arrest for a crime, and that arrest is based on probable cause, arresting officers should not have to fear that they will be subject to liability for a First Amendment retaliatory-arrest claim. State law enforcement would be impaired if officers are deterred from making arrests by the prospect that they will have to defend their subjective motivations years later in a subsequent civil lawsuit.

The *Amici* States urge this Court to uphold the court of appeals' decision and, consistent with its decision in *Hartman v. Moore*, 547 U.S. 250 (2006), determine that the absence of probable cause is an element of a First Amendment retaliatory-arrest claim.

SUMMARY OF ARGUMENT

As respondent explains, it follows from this Court's precedent and common-law analogues that 42 U.S.C. § 1983 requires a plaintiff to show a lack of probable cause to recover damages for an arrest allegedly in violation of the First Amendment. The *Amici* States write to highlight two additional points.

1. Petitioner's proposed rule will create immense practical difficulties for law enforcement. Under this rule, virtually every arrest would give rise to a potentially viable retaliatory-arrest lawsuit for damages. It would be easy for any arrestee to claim that he engaged in protected speech contemporaneous with his arrest and thus that the arrest was in retaliation for the speech. Routinely, suspects speak to police during encounters, make other reported or overheard statements, and display speech on their clothing, possessions, or vehicles. Unless the speech itself constitutes a crime, virtually all of it would be protected under established law.

It would similarly be easy for an arrestee to allege that the arrest was motivated, in part, by the officer's disagreement with this speech. Much of the speech might be critical and outspoken. Suspects will naturally object to police inquiry, protest their innocence, or communicate their displeasure in other ways. This can turn quite hostile, and police are required to withstand a high degree of insults and verbal abuse in doing their jobs. Persons may also choose to break a law either as a chosen means of protest on some topic or to state their objections to the law itself. Additionally, a suspect's speech may be inculpatory, by suggesting the requisite state of mind, a motive, or other facts relevant to guilt. In all these situations, an arrestee could readily claim that the speech was a motivating factor in his arrest.

Because retaliation would be so easy to claim, petitioner's rule would discourage officers from enforcing the law. Without the protection of an objective, probable-cause test, arresting officers would fear a suit that likely could not be decided without burdensome discovery and a trial. They would also correctly

foresee a real threat of liability inherent in a jury trying to reconstruct their subjective motivations. Because police often must make arrest decisions under difficult and tense circumstances, the threat of such litigation would cause them to hesitate to arrest, even when supported by probable cause and the need to protect the public. Petitioner's rule would also make police encounters more dangerous by encouraging hostility toward officers as a way to avoid arrest.

Petitioner's rule makes an officer's job even more difficult by focusing liability on whether the officer, in his defense, can show that police generally arrest for the crime. An officer cannot realistically know, on the scene, whether he is vulnerable to liability because the offense is one that is not commonly enforced. Petitioner identifies no practical method for making this determination, even for purposes of the officer's defense at trial. His rule is simply unworkable.

Moreover, petitioner's test impairs the ability of police to address localized community problems. Factoring liability on whether police generally arrest for an offense would gradually pressure police, as suits are litigated, to categorize each offense as either one for which they always arrest or never arrest. Among other problems, this frustrates the application of community policing, under which police act with greater discretion, continually using input from the community on what problems warrant police resources and what responses are effective.

2. Petitioner's rule is unnecessary to protect First Amendment interests. States and localities can take effective remedial action in response to citizen complaints of police misbehavior, including alleged retaliation. Law enforcement agencies have an important duty, as well as direct interest, in ensuring that citizen

complaints against officers are thoroughly investigated and appropriate disciplinary action is taken. Such internal review is a vital component of managing a police department and maintaining the public trust upon which law enforcement depends. State and local governments can flexibly adopt solutions that promote law enforcement accountability and effectiveness.

Many forms of external review of citizen complaints have also been implemented throughout the nation. In many cities, citizen review boards with subpoena powers directly investigate complaints and make findings and recommendations. Other jurisdictions have independent oversight agencies that closely review a police department's handling of its own internal affairs investigations. Though the mechanisms may vary, each locality can select the administrative process that best addresses its own situation. State governments have their own oversight role, too, and can enact legislation and policies to ensure that citizen complaints are appropriately handled.

States may also afford additional protections against retaliatory arrest by limiting the arrest power and establishing alternatives to arrest. States generally prohibit warrantless arrests for misdemeanors unless the crime is committed in the officer's presence. States have also circumscribed the power to arrest by providing for release on citation or summons, in lieu of a full custodial arrest, for certain crimes or under certain circumstances. The policies of local governments and police departments may establish additional standards and guidelines for citation in lieu of arrest, thus limiting the potential of retaliatory arrests for such crimes. First Amendment interests are important, but petitioner's highly flawed and impractical rule is not the only option for protecting them.

ARGUMENT

I. Petitioner's Rule Would Inhibit Effective Policing By Discouraging Necessary Arrests, Heightening The Peril Of Arrest Situations, And Limiting The Ability Of Police To Respond To Community Problems.

As the court below correctly recognized, the existence of probable cause defeats a claim for retaliatory arrest. Pet. App. 7a-8a. That conclusion makes sense as a legal matter, *see* Resp. Br. 10-41, but it also furthers important public safety goals. If officers find probable cause to arrest under the totality of the circumstances, they should be entitled to make that arrest—and thereby protect public safety—without fear that they will later be subject to a suit challenging their subjective motivations. Petitioner's contrary rule, while proposed here in a suit against a municipality, would apply equally to the far more typical case brought against the arresting officers. The threat of such suits would not only make officers' already difficult and dangerous jobs even more so, but also hinder law enforcement agencies from taking custody of offenders and implementing effective community policing.

A. Under petitioner's rule, nearly all arrestees could bring suit—and likely force a trial—by questioning the officers' subjective motivations.

1. Retaliatory arrest could be easily claimed in most instances given the prevalence of suspects' protected speech.

Under petitioner's rule, an arrestee may subject his arresting officers to a burdensome lawsuit simply by alleging a retaliatory motive. Such claims will be easy

to advance because an arrestee will almost always be able to identify protected speech contemporaneous with his arrest. There is a "vast realm" of protected speech; content-based restrictions are limited to just a few traditional categories (such as fraud, fighting words, and true threats). *United States v. Alvarez*, 567 U.S. 709, 717-18 (2012) (plurality op.). As a result, in virtually every case an arrestee will have contemporaneously engaged in protected speech.

Suspects rarely remain completely silent during an entire police encounter. Those who have broken the law are not happy with police attention and often speak critically of police. Hoping to frustrate the police investigation and ultimately avoid arrest, they routinely protest their innocence to officers or criticize the propriety of police action. They may also engage in speech that is highly offensive but nevertheless also protected, such as by hurling insults and profanities at police officers. Indeed, this Court has suggested additional First Amendment protection for such speech, in part *because* police officers are trained not to respond to such abuse. *Houston v. Hill*, 482 U.S. 451, 461-62 (1987). Most courts agree and hold police to a higher standard. *State v. Baccala*, 163 A.3d 1, 9 (Conn. 2017) (citing cases).

Perversely, under petitioner's view, a suspect's insults and profanities may well suggest—especially to lay jurors—that officers responded in a retaliatory manner. After all, such words are designed to provoke, and if spoken to an average citizen, would ordinarily prompt an angry and perhaps violent response. Even a suspect's more tempered criticism or disapproval of the officers could still easily be alleged to have motivated an arrest.

An arrestee could also readily allege retaliatory motive when his lawbreaking is directly tied to speech or protest. Persons may break a law to express disagreement with the law itself or related governmental policy. *See Wayte v. United States*, 470 U.S. 598, 600-01 & n.2 (1985) (letters explaining refusal to register with Selective Service). Or they may violate the law simply to express themselves in a manner of their own choosing. For example, protestors may encamp unlawfully on public space, using such continued occupation to expound their message. *See Dukore v. District of Columbia*, 799 F.3d 1137, 1138-39 (D.C. Cir. 2015). Protestors may also trespass on private property of entities whose practices or views they oppose. *See Logsdon v. Hains*, 492 F.3d 334, 337-38 (6th Cir. 2007) (abortion protestors); *Joyce v. Crowder*, 480 F. App'x 954, 955 (11th Cir. 2012) (environmental activists). Because of the close connection between the offense and the expressions of protest in these circumstances, an arrestee could well claim a promising case of retaliation. *See, e.g.*, *Dukore*, 799 F.3d at 1139.

Even speech that provides evidence of criminal activity is protected. A suspect's own speech might place him at the scene of the crime, reveal a motive, or indicate that he acted with the requisite intent or knowledge. But, in petitioner's view, an officer who relies on such inculpatory statements would then become automatically subject to a retaliatory arrest claim. Pet. Br. 33-34. After all, the content of the arrestee's speech would admittedly be a motivating factor in such an arrest. As petitioner has explained, to avoid liability in this circumstance, the officer would have to show that police "generally make arrests for that crime." Reply to Br. in Opp. 10; *accord* Pet. Br. 35 & n.10. It is not clear, however, how an arresting officer could possibly prove this, and even if he could,

there is no reason why an officer who arrests a suspect based on the suspect's own inculpatory statements should be forced to litigate in this circumstance.

The risk of a subsequent suit for retaliatory arrest exists even in the rare case where the suspect says nothing to the officer directly. Officers often overhear, or receive reports of, statements made by the suspect. And even where the suspect himself is entirely silent, he could later claim that something as simple as the bumper sticker on his car or a slogan on his t-shirt was protected speech giving rise to the arrest.

Unable to propose a principle to limit the flood of potential litigation stemming from suspects' speech, petitioner vaguely suggests that sometimes "otherwise protected speech will lose its protection." Pet. Br. 33. By this, petitioner apparently just means that the government may, to some extent, regulate speech in a content-neutral manner. This, however, fails to mitigate the ease with which damages claims would be permitted for allegedly retaliatory arrests that are nevertheless based on probable cause. To use petitioner's own example, a person who criminally violates a reasonable time restriction on speech—disrupting a city council meeting by refusing to stop speaking beyond his allotted time—*would have* a valid retaliatory arrest claim under petitioner's view. *See* Pet. Br. 33. All that the person would have to do is allege that the content of his speech motivated his arrest and dispute that police ordinarily arrest for such violations.

Petitioner also suggests that "speech that confesses to a crime" might not be protected, but fails to explain why under his test. Pet. Br. 33. To use another of petitioner's examples, if a person is arrested after stating that he has burned his draft card because of

his beliefs, then he could still claim that his arrest was retaliatory. *See* Pet. Br. 33-34 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). His claim would be that he would not have been arrested if he had simply omitted mention of his beliefs. Even in the case of a confession, it would be easy to allege that protected speech motivated an arrest.

2. *Petitioner's rule would effectively transform the standard for arresting officers' liability, including qualified immunity, from an objective test into a subjective one.*

Because a showing of protected speech poses little obstacle, petitioner's test for retaliatory-arrest claims would depend on the subjective motivations of the arresting officers. It would thereby supplant the objective standards that this Court, through decades of precedent, has firmly established for assessing the constitutionality of an arrest. "[T]his Court has long taken the view that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'" *Kentucky v. King*, 563 U.S. 452, 464 (2011) (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)).

Qualified immunity would provide arresting officers little protection if it too turned on their subjective motivations. It is designed "to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). As this Court has established, an objective standard for assessing the officers' actions is needed for this purpose. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). This is because "[j]udicial inquiry into subjective motivation . . . may entail broad-rang-

ing discovery and the deposing of numerous persons, including an official's professional colleagues." *Id.* at 817. After extensive discovery, arresting officers would then likely have to undergo a trial, since "questions of subjective intent so rarely can be decided by summary judgment." *Id.* at 816. As the *Harlow* Court concluded, basing qualified immunity on an officer's subjective motivations "has proved incompatible with [this Court's] admonition . . . that insubstantial claims should not proceed to trial." *Id.* at 815-16.

Petitioner argues implicitly that an officer with retaliatory motive would not be entitled to qualified immunity even if the arrest were objectively reasonable, *i.e.*, supported by probable cause. Pet. Br. 37-38. To be sure, if it were unclear whether the speech was protected, petitioner might concede that qualified immunity would apply. Otherwise though, in petitioner's view, the retaliatory motive establishing a First Amendment violation would necessarily defeat qualified immunity, and thus qualified immunity would provide officers no added protection.

If needed, this Court could (and should) hold that, to the contrary, the existence of probable cause, or arguable probable cause, entitles an officer to qualified immunity on a First Amendment retaliatory-arrest claim. *See Crawford-El v. Britton*, 523 U.S. 574, 612 (1998) (Scalia, J., dissenting). Such a holding would preserve that doctrine's protections for official acts that are objectively reasonable, whatever the subjective intent. But, especially without such an extension of qualified immunity, petitioner's proposed rule would institute a profound and unwarranted shift in assessing officers' liability for arrests. It would replace well-established objective standards with an

open-ended inquiry into an officer's subjective motivations.

B. Petitioner's subjective test would discourage officers from enforcing the law and heighten the danger of arrest situations.

The resulting litigation over officers' subjective motivations for arrests would impose significant societal costs. These would be beyond just the "general costs of subjecting government officials to the risks of trial," such as the "distraction of officials from their governmental duties." *Harlow*, 457 U.S. at 816. First, petitioner's proposal would have a particularly adverse effect on the ability of the States to protect their citizens from crime. "States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity, even where there has been no opportunity for a prior judicial determination of probable cause." *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991). Among its other purposes, a custodial arrest "ensures that a suspect appears to answer charges and does not continue a crime." *Virginia v. Moore*, 553 U.S. 164, 173 (2008).

The threat of damages claims based on an officer's subjective motivations would dissuade officers from making legitimate arrests. Officers who acted without retaliatory animus would still have reason to fear not only the burdens of litigation, but also the potential liability that could result. They would be aware that a retaliatory motive is "easy to allege and hard to disprove." *Crawford-El*, 523 U.S. at 584-85. They also often must act "on the spur (and in the heat) of the moment." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Yet an officer would undoubtedly hesitate to act decisively knowing that a court or jury—far

removed from that moment—would later dissect the constitutionality of his actions based on its own reconstructed view of his thought processes. Officers would thus be incentivized to forgo arrest even when such action is appropriate to secure the public safety. *See Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 337-38 (2012) (explaining rejection of proposed rule for warrantless arrests because "the risk of violating the Constitution would have discouraged [officers] from arresting criminals in any questionable circumstances").

Additionally, police encounters with suspects would become more perilous. Criminals would learn that confrontational speech could be particularly effective in forestalling arrest, because of its added value for a potential lawsuit and the deterrent effect that would have on all but the most resolute officers. Indeed, from the lawbreaker's perspective, the more confrontational and incendiary the speech, the better. Officers meanwhile might reasonably perceive that the suspect's hostility could turn violent. Potential arrest situations are already tense, uncertain, and subject to sudden escalation. Adding a further element of provocation into such a fraught situation would increase the risk of harm to all involved.

C. Petitioner's reliance on whether a law is commonly enforced would further complicate officers' jobs and prove unworkable in practice.

Petitioner's emphasis on whether police generally arrest for the relevant offense only compounds the problem. *See* Pet. Br. 35-36. To protect themselves from suit under petitioner's test, officers would need to know whether the offense for which they have probable cause is "commonly enforced." Pet. Br. 35 n.10.

The answer would be important, in petitioner's view, to both aspects of causation—whether retaliatory motive was a substantial factor in the arrest and, if so, whether the arresting officers had shown that they would have made the arrest anyway. Pet. Br. 35-36. But this would place arresting officers in an impossible spot. Whether a law is generally enforced is not a test that an officer can apply on the scene, especially in the brief time available to decide whether to arrest. *See Florence*, 566 U.S. at 338 ("Officers who interact with those suspected of violating the law have an essential interest in readily administrable rules." (internal quotation marks omitted)).

Petitioner tries to assure that a retaliatory-arrest claim "will likely fail" where a "serious crime" has been committed, since he assumes that police arrest for such crimes virtually every time they can. Pet. Br. 35-36. But this does little, if anything, to ease an officer's predicament. Petitioner does not define what constitutes a "serious" crime and offers only a couple of isolated examples, such as armed robbery. Pet. Br. 36. But only an estimated 5% of arrests are for violent felonies (murder and nonnegligent manslaughter, rape, robbery, and aggravated assault). Federal Bureau of Investigation, *Crime in the United States 2016*, https://tinyurl.com/yatbcyox. Most arrests are presumably for misdemeanors. *See id.*; Cal. Dep't of Justice, *Arrests Reported from 2007-2016*, https://openjustice.doj.ca.gov/2016/arrests (reporting twice as many misdemeanor arrests as felony arrests in California). As the vagueness of petitioner's attempted assurances shows, whether the relevant criminal law is "commonly enforced" will not be apparent for the vast majority of arrests.

Not only would petitioner's rule be impossible for an officer to apply in the field, it would be very difficult

for him to meet in his own defense at trial. Petitioner fails to identify a workable, meaningful measure of how commonly a law is enforced, or indeed any measure at all. Notwithstanding a fleeting reference to "[p]ublicly available statistical information," Pet. Br. 35 n.10, petitioner also fails to show that the requisite statistics for any such measure are even generally available. Beyond these insurmountable obstacles, a stream of other complications would arise in trying to measure whether police generally arrest for an offense. Is the relevant geographic pool nationwide, or by state, police department, or police district? How narrowly or broadly should the relevant offense be categorized? How is the measure affected when multiple or overlapping offenses are involved? And so on.

D. Petitioner's rule would impair the ability of police departments to respond to community problems and concerns.

By looking to whether a law is generally enforced to determine liability, petitioner's rule would inhibit the flexibility of police to address particular community problems as they arise. It would instead, as cases are brought over time, encourage police to divide criminal offenses into two categories: those for which they should always arrest and those for which they should never arrest. After all, to the extent that a law is enforced at every possible opportunity through an arrest, then officers would have a strong, if not air-tight, defense to a retaliatory-arrest claim. Conversely, police would be inclined to forgo an arrest if the criminal law that has been violated will not, or cannot, be regularly enforced at all other times and locations. Fearing a retaliatory-arrest claim, officers would be especially hesitant to make legitimate arrests for many types of offenses that might not be considered

"commonly enforced" or clearly "serious." This would be a natural if unintended consequence of petitioner's rule.

Among other problems, this inflexible, "all or nothing" approach is antithetical to the concept of community-oriented policing and other proactive policing strategies. Petitioner's rule reinforces an outdated view of policework: one that is basically reactive, waiting for a crime to be reported or observed and then responding in some automatic fashion based on the seriousness of the offense under the criminal code. *See* Alafair Burke, *Policing, Protestors, and Discretion*, 40 Fordham Urb. L.J. 999, 1009-10 (2013).

By contrast, community-oriented policing emphasizes that "[l]aw enforcement agencies should work with community residents to identify problems and collaborate on implementing solutions that produce meaningful results for the community." *Final Report of the President's Task Force on 21st Century Policing* 45 (2015), https://ric-zai-inc.com/Publications/cops-p311-pub.pdf. Community policing calls for decentralized decision-making, involving "increasing tolerance for risk taking in problem-solving efforts, and allowing officers discretion in handling calls." Office of Community Oriented Policing Servs., U.S. Dep't of Justice, *Community Policing Defined* 5-6 (2014), https://tinyurl.com/y7gows48. It also envisions continually identifying and prioritizing problems, designing responses, and evaluating their effectiveness. *Id.* at 10-12.

The mistaken premise of petitioner's approach is that certain offenses are too minor, or result too infrequently in arrest, such that any arrest for those offenses would be inherently suspect. Far from it. Sometimes heightened enforcement of certain "minor" criminal laws can be quite important to a community.

"[T]he narrow focus of the past on the seeming triviality of incidents of minor disorder ignores the communal harms that can be visited upon a neighborhood when these incidents multiply into a neighborhood problem." Debra Livingston, *Police Discretion and the Quality of Life in Public Places*, 97 Colum. L. Rev. 551, 591 (1997). "[I]n community policing, police often exercise their discretion by addressing low-level crimes that might not warrant attention in comparison to more serious crimes, but which the community views as detrimental to their quality of life." Burke, *supra* at 1010-11. Potential community concerns are manifold and could include, as just a few examples, late-night noise and disorderly conduct, trespassing, graffiti, illegal dumping, or package theft.

At the same time, a community-oriented approach encourages police "to think innovatively" and "view making arrests as only one of a wide array of potential responses." *Community Policing Defined*, *supra* at 10. By seeking the community's input as to both problems and responses, "community policing tends to be extremely localized." Burke, *supra* at 1011. Petitioner's demand that arresting officers show that police generally arrest for the offense ignores the dynamic nature of community policing and undercuts its application.

II. States And Localities Have Effective Mechanisms For Ensuring That Officers Do Not Make Retaliatory Arrests, And Therefore A Damages Remedy Is Unnecessary.

Petitioner's rule is especially unwarranted given the comprehensive procedures that state and local jurisdictions have developed to address police misconduct and control the power of arrest. Those safeguards can ably protect against retaliatory arrests without eliminating the objective, probable-cause standard for

an arrest's constitutionality and opening the floodgates to damages lawsuits. State and local governments are better situated to fashion flexible remedies that balance effective law enforcement with proper restraints on police officers and redress for their misdeeds.

A. Administrative review of police conduct provides an effective alternative for investigating and addressing allegations of retaliation.

State and local jurisdictions are capable of handling citizen complaints against officers for improper conduct, including retaliatory arrests. Of course, judicial safeguards will always remain, such as when arrest is without probable cause or where criminal laws lack "minimal guidelines to govern law enforcement." *Chicago v. Morales*, 527 U.S. 41, 60 (1999). But regardless of the potential for civil liability, officers who arrest or take other actions for improper reasons are subject to disciplinary action. Both internal and external administrative processes exist throughout the nation to provide an efficient and effective response to complaints against officers who violate the law or local policies. This provides a valuable check against retaliatory arrests.

Law enforcement agencies, including through internal affairs units in larger agencies, receive and resolve citizen complaints as an important part of their law enforcement functions. There is widespread recognition among law enforcement that holding officers accountable for their actions is essential to maintain the public legitimacy that police need to be effective. Int'l Ass'n of Chiefs of Police, *Building Trust Between the Police and the Citizens They Serve* 5-7, https://ric-zai-inc.com/Publications/cops-p170-pub.pdf. Indeed, such public accountability is another component of

community-oriented policing. *Id.* Citizen complaints also assist a police department in supervising and managing its officers. Those complaints not only help identify officers who should be monitored more closely, disciplined, or removed for misconduct, but also reveal areas where better training or enhanced supervision is needed. In short, police departments have an interest as well as a duty in appropriately investigating citizen complaints.

Citizen review boards, or other types of external review, are another mechanism to address citizen complaints. "[C]ivilian oversight has been increasingly institutionalized as a regular feature of policing in cities and counties across the U.S." Joseph De Angelis, et al., *Civilian Oversight of Law Enforcement: Assessing the Evidence* 49 (2016), https://tinyurl.com/y94aelhc (identifying "more than 140 civilian oversight agencies, with almost all large cities having some sort of civilian oversight"). There is a wide range of civilian oversight—from "limited authority to reviewing and making recommendations to boards that have investigative and subpoena powers"—and each community may consider its own form of civilian oversight that meets its needs. *The President's Task Force on 21st Century Policing Implementation Guide* 7 (2015), https://ric-zai-inc.com/Publications/cops-p341-pub.pdf. Among its features, civilian oversight can provide independent review of citizen complaints.

In the District of Columbia, for example, a citizen may file a complaint with the independent Office of Police Complaints, which is overseen by a publicly appointed board. D.C. Code §§ 5-1104, 5-1105. The Office of Police Complaints investigates complaints of harassment (among other types of complaints), which broadly includes arrests in violation of the law or

internal police guidelines. D.C. Mun. Regs. tit. 6A, §§ 2104.1, 2199.1. It has the power to subpoena witnesses and documents. D.C. Code § 5-1111(c). The Office of Police Complaints even has direct and immediate access to the videos from body-worn cameras that all D.C. Metropolitan Police Department patrol officers now use. D.C. Office of Police Complaints, *Annual Report 2017*, at 18-19, https://tinyurl.com/ycvouesc. If the Office sustains a complaint, it refers the matter to the Metropolitan Police Department to recommend, and the police chief to decide, the imposition of discipline. D.C. Code § 5-1112. Generally, the police chief may not reject the merits determination of the Office of Police Complaints. D.C. Code § 5-1112(e), (g).

Other cities have similar review boards that investigate citizen complaints against police officers. In New York City, an independent Civilian Complaint Review Board with subpoena power investigates several types of complaints—including complaints of abuse of authority—and makes merits findings. N.Y.C., N.Y., Rules tit. 38A, §§ 1-02(a), 1-23(d). If it substantiates the allegations, the Board recommends a type of discipline and, in the most serious cases, can prosecute disciplinary charges against the officer at an administrative trial. *See* N.Y.C. Civilian Complaint Rev. Bd., *Police Discipline*, https://www1.nyc.gov/site/ccrb/prosecution/police-discipline.page. If the police commissioner intends to impose discipline at a level below that recommended by the board or administrative tribunal, the commissioner must provide a detailed explanation of the reasons and allow the board an

opportunity to respond. N.Y.C., N.Y., Rules tit. 38A, § 1-46(f).[1]

External review can take other forms, such as review of a department's internal affairs investigations. For example, the Los Angeles Police Department has an independent inspector general, who is selected by a civilian Board of Police Commissioners. L.A., Cal., Charter vol. I, § 571(b)(4). The inspector general's office oversees the police department's handling of complaints of misconduct by police officers. L.A., Cal., Charter vol. I, § 573. It receives copies of every complaint filed, audits selected investigations, and conducts systemic reviews of the disciplinary system. *See* L.A. Police Dep't, *Office of the Inspector General*, http://www.lapdonline.org/police_commission/content_basic_view/1076. It also has subpoena power to conduct its own investigations. L.A. Bd. of Police Comm'rs, *Policies and Authority Relative to the Inspector General* § VII (approved Nov. 21, 2000), https://tinyurl.com/y7dab2vd.

Moreover, through legislation and policymaking, States can provide oversight of local citizen complaint

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[1] These civilian review agencies in the District of Columbia and New York City regularly report on complaint dispositions, including discipline and other remedial actions. *See* D.C. Office of Police Complaints, *Annual Report 2017*, at 32, https://tinyurl.com/ycvouesc; N.Y.C. Civilian Complaint Rev. Bd., *Semi-Annual Report, Jan.-June 2017*, at 25-31, https://tinyurl.com/yc7wjjcz. Of course, disciplinary action is imposed in many other instances directly through the police departments. These civilian review agencies also attempt to resolve complaints through mediation, which is held if both parties agree and can be very effective. *Annual Report 2017*, *supra* at 22-23; *Semi-Annual Report, Jan.-June 2017*, *supra* at 32-36. As the statistics show, civilian complaints produce meaningful outcomes, not empty processes.

processes. For example, California requires each police department to establish and publicize its procedure to investigate civilian complaints, provide the complainant timely, written notification of the complaint's disposition, and publicly report statistics on complaint dispositions. Cal. Penal Code §§ 832.5(a), 832.7(e)(1), 13012(a)(5)(A)(i), (B), (C). *See also* Cal. Dep't of Justice, *Policy Governing Citizen Complaints Against Law Enforcement* (Jan. 2017), https://tinyurl.com/ycqvhuy2 (establishing that the Attorney General will review citizen complaints against local law enforcement agencies for possible investigation after exhaustion of local processes).

Some states have also directed that commissions develop detailed standards that all law enforcement agencies must implement for the investigation of citizen complaints. In Connecticut, as specified by statute, those standards address issues such as the manner of acceptance of complaints, investigation protocols, and the documentation of the receipt of complaints and their dispositions. *See* Conn. Gen. Stat. § 7-294bb; Conn. Police Officer Standards & Training Council, *Mandatory Uniform Policy: Complaints That Allege Misconduct by Law Enforcement Agency Personnel* (May 14, 2015), https://tinyurl.com/y93qdw3y. Other states have similar statutes. *See* Me. Rev. Stat. tit. 25, § 2803-B(1)(G), (2); Md. Code Ann., Pub. Safety § 3-519; N.J. Stat. § 40A:14-181; Vt. Stat. Ann. tit. 20, § 2402 (effective July 1, 2018); *see also* R.I. Gen. Laws § 31-21.2-8.

Regardless of the particular mechanism in each jurisdiction, administrative processes are available to thoroughly investigate complaints of retaliatory arrest and impose appropriate disciplinary action, thus making a damages remedy unwarranted.

B. Additional protections exist through limitations on the arrest power and through policies on arrest alternatives.

To ensure that the power of arrest is used appropriately, States may also limit officers' authority to conduct a warrantless arrest. States generally preclude arrest without a warrant for misdemeanors committed outside of an officer's presence. *See Atwater*, 532 U.S. at 355-60 (listing statutes). This in-presence requirement is a safeguard that petitioner fails to mention but would almost certainly preclude warrantless arrest in all the examples he cites using Florida law. Pet. Br. 23; Fla. Stat. § 901.15 (authorizing arrests for misdemeanors committed "in the presence of the officer" if arrest is "made immediately or in fresh pursuit," excepting offenses such as domestic violence and child abuse).[2]

Many States have also chosen "more restrictive safeguards through statutes limiting warrantless arrest for minor offenses." *Atwater*, 532 U.S. at 352. Such safeguards include provision for release on a citation or summons, with a promise to appear later to answer the charge, in lieu of a full custodial arrest. By statute or court rule, almost all States provide for citation release for some misdemeanors (and occasionally even felonies). Nat'l Conference of State Legislatures, *Citation in Lieu of Arrest* (updated Oct. 23, 2017), https://tinyurl.com/yd9wsf9d (providing summary chart of state laws).

Twenty-four states create at least "a presumption to issue citations for certain crimes or under certain

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[2] Although petitioner suggests that stealing some computer paper would be a *felony* computer crime, this seems quite implausible, *see* Fla. Stat. § 815.02(3), and would surely be just misdemeanor theft under Fla. Stat. § 812.014(3)(a).

circumstances." *Id.* For example, this Court's decision in *Moore* arose because of a Virginia statute that generally directs officers to issue citations for most misdemeanor traffic offenses. 553 U.S. at 167; *see* Va. Code § 46.2-936. Another Virginia statute generally requires citations for most misdemeanors that are not punishable by a jail sentence. Va. Code § 19.2-74. These and other similar state statutes typically have exceptions permitting a custodial arrest, such as where there are reasonable grounds to believe that the person will not appear to answer the citation, will continue the offense, or poses a danger to persons or property. *Citation in Lieu of Arrest, supra.*

Where state law might not create a presumption or otherwise establish guidelines for citation release, localities may set their own policies. For example, New York City officials announced that police will issue summonses and "no longer arrest individuals who commit [low-level] offenses—such as littering, public consumption of alcohol, or taking up two seats on the subway—unless there is a demonstrated public safety reason to do so." Press Release, *District Attorney Vance, Commissioner Bratton, Mayor De Blasio Announce New Structural Changes to Criminal Summonses Issued in Manhattan* (Mar. 1, 2016), http://manhattanda.org/ node/5847/print. Other local governments have taken similar measures. *See, e.g.*, Edward Sheehy, et al., *Greenville Police to Issue Citations for Small Crimes Instead of Arrests*, WITN.com News (Oct. 9, 2017), https://tinyurl.com/y9ow3ll9. While discretionary determinations about public safety will still likely be involved in the decision whether to issue a citation in lieu of arrest, guidelines and policies can ensure that those determinations are based only on proper considerations.

As this Court has recognized, "it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason." *Atwater*, 532 U.S. at 352. States too recognize those costs and have fashioned laws and policies to achieve an appropriate balance of interests. *Citation in Lieu of Arrest, supra*. The arrest limitations adopted by states and localities further reduce any potential for retaliatory arrests.

CONCLUSION

This Court should affirm the decision of the court of appeals.

Respectfully submitted,

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No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

CITY OF RIVIERA BEACH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE FIRST AMENDMENT FOUNDATION, THE AMERICAN CIVIL LIBERTIES UNION, AND THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Branti v. Finkel,
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Marcavage v. City of New York,
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Naveed v. City of San Jose,
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Robertson v. Wegmann,
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Shuttlesworth v. City of Birmingham,
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FEDERAL STATUTES

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OTHER AUTHORITIES

Arrest / Criminal Charge, U.S. PRESS FREEDOM TRACKER, https://pressfreedomtracker.us/arrest-criminal-charge/ 11

David A. Harris, *"Driving While Black" and All Other Traffic Offenses*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997) 8

Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996) 5

Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

Overcriminalization, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, https://www.nacdl.org/overcrim/ 8, 9

Overcriminalization, RIGHT ON CRIME, http://rightoncrime.com/category/priority-issues/overcriminalization/ 9

Public Data, GOOGLE, goo.gl/dh55s 26, 27

Reporter Arrested for Shouting Questions at Trump Cabinet Official, U.S. PRESS FREEDOM TRACKER (2017), https://pressfreedomtracker.us/all-incidents/reporter-dan-heyman-arrested-shouting-questions-hhs-secretary/ 11

Yasmeen Serhan, *The Arrest of a Journalist Asking About Health Care*, ATLANTIC (May 10, 2017), https://www.theatlantic.com/news/archive/2017/05/the-arrest-of-a-west-virginia-journalist/526149/ 11

U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEP'T (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf 9, 10

INTEREST OF AMICI CURIAE[1]

The First Amendment Foundation is a nonprofit organization dedicated to promoting government openness and transparency throughout Florida, at both the state and local government levels. In addition to working with volunteers to audit government compliance with open meetings, public records, and other "sunshine" laws, the Foundation educates government officials, journalists, and the public about citizens' rights to obtain information from their governments. The Foundation also operates a hotline to answer questions about open government laws, handling more than 150 inquiries per month. Some of these inquiries come from members of the public expressing concerns about government retaliation or intimidation after exercising their right to request information.

A number of the Foundation's members have reported facing intimidation or retaliation for exercising their First Amendment rights. For instance, one member told the Foundation that she submitted a public records request at a police station as part of one of the Foundation's compliance audits—and was followed home by the police. Another member reported to the Foundation that he requested public records, and went to City Hall to pick them up—and was arrested for trespass upon arriving. And yet another recently informed the Foundation that, after he

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[1] Counsel for both parties have consented to the filing of this brief. In accordance with Rule 37.6, amici confirm that no party or counsel for any party authored this brief in whole or in part, and that no person other than amici or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

requested public records in order to investigate a potential public safety hazard, he was almost arrested; was invoiced for nearly $1,000; and was threatened by the city clerk.

In light of its mission and the reported experiences of its members, the Foundation has a strong interest in the public's ability to exercise its First Amendment rights, such as the right to request information from government officials. Accordingly, the Foundation has an interest in this case.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 1.5 million members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Florida is a state affiliate of the national ACLU, with over 50,000 members statewide. For nearly a century, the ACLU has been at the forefront of efforts nationwide to protect the full array of civil rights and civil liberties. Since its founding in 1920, the ACLU has frequently appeared before this Court in First Amendment cases, both as direct counsel and as amicus curiae. Many landmark civil rights decisions of the 1950s and 1960s arose out of free speech controversies, and involved the government's attempted use of its arrest powers to silence ideas and movements critical of government. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). History demonstrates that governmental efforts to retaliate against particular viewpoints are often aimed at those who challenge and criticize the *status quo*. The preservation of the principle of viewpoint neutrality is therefore of immense concern to the ACLU, the ACLU of Florida,

each of their civil rights clients seeking justice, and their members and donors.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

It is a bedrock principle of First Amendment law that government officials may not retaliate against individuals for engaging in constitutionally protected speech. In a variety of contexts, this Court has recognized that when government officials take an adverse action against an individual for the purpose of punishing or suppressing her speech—whether the government deprives the speaker of a government contract, dismisses her from public employment, or treats her unfavorably in prison—the government unlawfully chills expression. *See, e.g.*, *Board of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 685 (1996); *Branti v. Finkel*, 445 U.S. 507, 515 (1980); *Crawford-El v. Britton*, 523 U.S. 574, 578, 588 n.10 (1998). Under the established framework for analyzing such retaliation claims, government defendants will be liable for violating the First Amendment if the factfinder concludes that the defendants would not have taken action against the plaintiff but for their intent to punish or suppress protected expression. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

This case concerns a prevalent and powerful form of retaliatory action: retaliatory arrest. City officials who had vowed to "intimidate" petitioner in retaliation for his filing a Florida Sunshine Act lawsuit ordered petitioner's arrest when he criticized them at a city council meeting. Pet. Br. 2–6. Such retaliatory arrests are an especially potent means of chilling

First Amendment activity, for two reasons. First, retaliatory arrests not only silence the individual in question, but also send the message to others in the community that expression of disfavored views may result in being taken into law enforcement custody. Second, the power to arrest individuals, including for minor offenses, is particularly susceptible to misuse for retaliatory purposes. As a practical matter, police and other officials have broad discretion to arrest, or order the arrest of, individuals for an exceedingly wide range of infractions, however minor. The sheer breadth of that discretion has made retaliatory arrests in response to protected First Amendment activity a serious problem, as recent media reports and retaliatory arrest cases demonstrate. And this case provides particularly "compelling" evidence, as the court of appeals put it, of the threat to protected speech posed by retaliatory arrests: local officials acted with the expressed intent both to punish petitioner for petitioning the government and to silence him in the future. Pet. App. 10a.

In many cases, the only way for a citizen to deter such government retaliation, and to seek redress for past retaliation, is through an after-the-fact damages action. In order to ensure that such suits remain an effective check on retaliatory arrests, this Court should hold that the *Mt. Healthy* framework applies in this context, as it does in Equal Protection challenges to racially motivated arrests, and to First Amendment and Equal Protection challenges to other government actions that single out citizens for disfavored treatment for impermissible motives. That framework properly recognizes that the governmental motive behind any restriction on speech is "a hugely important—indeed, the most important—explanatory

factor in First Amendment law." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 415 (1996). In fact, the Court has explicitly held that illicit motive is the key consideration in evaluating government retaliation for an individual's exercise of First Amendment rights. *See Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016) (affirming the primacy of official motivation where the government took adverse action against an individual based on the mistaken belief that he had engaged in protected speech). That rule should apply here: where government officials invoke the state's criminal power in order to target an individual's opinions or ideology, the First Amendment provides a powerful and necessary check on such retaliation.

By contrast, holding that the existence of probable cause renders official intent irrelevant would provide standing pretext for governmental officials to single out and punish dissenters without consequence. In light of the innumerable minor infractions contained in state and local codes, and the relative ease of demonstrating probable cause, government defendants will almost always be able to point to one or more offenses for which probable cause existed. This case provides a particularly salient example: respondent ultimately defeated petitioner's claim by establishing that his arrest was supported by probable cause of the offense of disturbing a lawful assembly—an offense different than the one for which he was arrested. Pet. Br. 9–12. If probable cause defeats a First Amendment retaliatory arrest claim, then, municipalities and officials will be insulated from liability for most retaliatory arrest claims—even where, as here, there is incontrovertible evidence that a city of-

ficial ordered a speaker's arrest as punishment for engaging in protected speech, and with express intent to intimidate him.

The danger of being arrested in retaliation for engaging in protected speech—without recourse—chills the exercise of core First Amendment rights, such as questioning or otherwise criticizing the government. The chilling effect is likely to be especially acute in smaller towns and cities across America, where vocal critics often continuously interact with local officials and are therefore at a higher risk of retaliation. This Court should therefore reverse the decision below and hold that probable cause, standing alone, does not automatically defeat a First Amendment claim for retaliatory arrest.

ARGUMENT

A RULE THAT PROBABLE CAUSE, STANDING ALONE, AUTOMATICALLY DEFEATS A FIRST AMENDMENT RETALIATORY ARREST CLAIM WOULD SEVERELY UNDERMINE FREEDOM OF EXPRESSION.

The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Reflecting this "profound national commitment" to the freedom of expression, *id.*, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory

actions . . . for speaking out[.]" *Hartman v. Moore*, 547 U.S. 250, 256 (2006). The ability to bring a damages action when such "retaliatory actions" occur, *id.*, serves as both an important check on government abuse, and an opportunity—often the only one—for the individual to vindicate her rights. *See, e.g.*, 42 U.S.C. § 1983; *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978).

Adopting the rule advocated by respondent would severely limit the effectiveness of this check because it would bar a plaintiff from stating a claim for retaliatory arrest where there is probable cause that she has committed *any* infraction, no matter how strong the evidence of retaliatory motive, or how minor the infraction. Given the myriad federal, state, and local laws and regulations that govern everyday activities, most people routinely—and unintentionally—commit minor infractions. Under the decision below, probable cause to believe a person has committed any of these infractions will immunize a retaliatory arrest from First Amendment challenge, leaving citizens with no effective means of addressing the chilling effect such arrests create.

A. Arrests Carried Out In Retaliation For Protected Speech Are A Serious Problem.

Given the wide range of offenses that can lead to arrest, officers can almost always identify some probable cause sufficient to justify an arrest. That is a serious problem, not only in theory, but also as borne out by the experience of citizens across the country.

1. Most individuals, often inadvertently, commit some sort of arrestable infraction on a regular, if not

daily, basis. Consider these observations about the typical American traffic code:

> There is no detail of driving too small, no piece of equipment too insignificant, no item of automobile regulation too arcane to be made the subject of a traffic offense. Police officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation. . . . For example, in any number of jurisdictions, police can stop drivers not only for driving too fast, but for driving too slow. In Utah, drivers must signal for at least three seconds before changing lanes; a two second signal would violate the law. In many states, a driver must signal for at least one hundred feet before turning right; ninety-five feet would make the driver a[n] offender. . . . Many states have made it a crime to drive with a malfunctioning taillight, a rear-tag illumination bulb that does not work, or tires without sufficient tread. They also require drivers to display not only license tags, but yearly validation stickers, pollution control stickers, and safety inspection stickers; driving without these items displayed on the vehicle in the proper place violates the law.

David A. Harris, *"Driving While Black" and All Other Traffic Offenses*, 87 J. CRIM. L. & CRIMINOLOGY 544, 557–59 (1997) (citations omitted).

Such intricate regulatory systems are not unique to the traffic code—thousands of federal and state laws criminalize a wide range of activity. *See, e.g.*, *Overcriminalization*, NAT'L ASS'N OF CRIMINAL DEF.

LAWYERS[2] (observing that there are "over 4,450 crimes scattered throughout the federal criminal code, and untold numbers of federal regulatory criminal provisions"); *Overcriminalization*, RIGHT ON CRIME[3]; *id.* (observing that Texas alone has more than 1,700 crimes on the books).

Officers have wide discretion under state and federal law to arrest individuals for these offenses, however minor. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 323, 344 & nn.12–13, 355–60 (2001); U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEP'T 82 (2015)[4] (discussing the Ferguson Police Department's "aggressive enforcement of even minor municipal infractions"). "The breadth of street crime violations—loitering, trespassing, gang injunctions, and the like—confers vast power on urban police that permits widespread arrests for petty offenses." Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1359 (2012).

And even if an individual is not arrested at the time of an infraction, she may be subject to later arrest for a missed court appearance or missed payment relating to that infraction. *See* INVESTIGATION OF THE FERGUSON POLICE DEP'T 55; *see also id.* ("The large number of warrants issued by the court . . . is due exclusively to the fact that the court uses arrest warrants and the threat of arrest as its primary tool for collecting outstanding fines for municipal code violations."); *id.* at 56 ("From 2010 to December 2014,

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[2] https://www.nacdl.org/overcrim/ (last visited Dec. 21, 2017).

[3] http://rightoncrime.com/category/priority-issues/overcriminalization/ (last visited Dec. 21, 2017).

[4] https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/fergusonpolice_department_report.pdf.

the offenses (besides Failure to Appear ordinance violations) that most often led to a municipal warrant were: Driving While License Is Suspended, Expired License Plates, Failure to Register a Vehicle, No Proof of Insurance, and Speed Limit violations.").

The sheer breadth of police discretion gives rise to a significant danger that officers or other officials will sometimes decide to arrest individuals for improper reasons—including in retaliation for their protected speech.

2. That danger is hardly hypothetical, as a survey of current events demonstrates. For instance, just last month, a federal court granted a preliminary injunction in favor of plaintiffs alleging that police had engaged in unconstitutional conduct in connection with protests following a state-court criminal case verdict, enjoining defendant City of St. Louis from, among other things, "[d]eclar[ing] an unlawful assembly": (1) "when the persons against whom it would be enforced are engaged in expressive activity, unless the persons are acting in concert to pose an imminent threat to use force or violence or to violate a criminal law with force or violence," or (2) "for the purpose of punishing persons for exercising their constitutional rights to engage in expressive activity." *See Ahmad v. City of St. Louis*, No. 4:17 CV 2455 CDP, 2017 WL 5478410, at *1, *10, *18 (E.D. Mo. Nov. 15, 2017).

This problem reaches not only protesters but also journalists. For example, earlier this year, Public News Service reporter Dan Heyman was reportedly arrested based on alleged willful disruption of a state-government process, after asking then-Health and

Human Services Secretary Tom Price about health care policy. *See* Yasmeen Serhan, *The Arrest of a Journalist Asking About Health Care*, ATLANTIC (May 10, 2017).[5] Reportedly, one condition of Mr. Heyman's bail was that he "had to keep away from the state capitol"—impinging on his ability to work. *See Reporter Arrested for Shouting Questions at Trump Cabinet Official*, U.S. PRESS FREEDOM TRACKER (2017).[6] The charges against Mr. Heyman have since been dropped. *Id.* According to the U.S. Press Freedom Tracker, Mr. Heyman is one of 32 journalists to have been arrested on the job this year so far. *See Arrest / Criminal Charge*, U.S. PRESS FREEDOM TRACKER.[7]

3. Reported cases from around the country further demonstrate that retaliatory arrests based on protected First Amendment activity are a serious concern—and underscore the dangers of the rule set forth in the decision below. This troubling practice often arises, for example, in the context of police arrests of individuals that result from those individuals' exercise of their First Amendment right to question or disagree with the police in non-exigent circumstances.

a. In *Allen v. Cisneros*, 815 F.3d 239 (5th Cir. 2016), a Houston street preacher alleged that he had been subjected to two retaliatory arrests in violation

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[5] https://www.theatlantic.com/news/archive/2017/05/the-arrest-of-a-west-virginia-journalist/526149/.

[6] https://pressfreedomtracker.us/all-incidents/reporter-dan-heyman-arrested-shouting-questions-hhs-secretary/ (last visited Dec. 21, 2017).

[7] https://pressfreedomtracker.us/arrest-criminal-charge/ (last visited Dec. 21, 2017).

of his First Amendment rights. *Id.* at 241–43. Both times, he was arrested after preaching on the street carrying a shofar, which "is a trumpet-like instrument made from a ram's horn" that is "used in Judaism to mark the holidays of Rosh Hashanah and Yom Kippur." *Id.* at 241–43 & n.1. The preacher and the defendants had differing versions of the events that transpired, with the preacher alleging that, each time, he had been arrested after trying to film the police. *See id.* at 242–43. But because the plaintiff's "possession of his shofar independently provided reasonable suspicion for his detention" based on a "city ordinance" that "specifically prohibited 'carry[ing] or possess[ing] while participating in any demonstration' objects that 'exceed three-quarters inch in their thickest dimension,'" *id.* at 245 (alterations in original), the Fifth Circuit held that the officers should prevail as a matter of law. *See id.* at 245–47.

b. In *Baldauf v. Davidson*, No. 1:04-cv-1571-JDT-TAB, 2007 WL 2156065 (S.D. Ind. July 24, 2007) (hereinafter *Baldauf II*), the plaintiff was arrested after a confrontation with a police officer at a convenience store. *Id.* at *1. At one point, the officer pointed a finger at the plaintiff, but she pushed it aside. *Id.* After the confrontation, the officer told the plaintiff that "he was not going to arrest her and that she could leave." *Id.* But as the plaintiff "was leaving, she told [the officer] that she was going to file a complaint with" the police chief. *Id.* The officer then arrested her when she was talking to the police chief at the station. *Id.* The district court determined that, although the plaintiff may have had an "otherwise worthy [retaliatory arrest] claim," it was barred by the existence of probable cause that she had committed battery when she had earlier pushed aside the

officer's finger. *Id.* at *1, *4; *see also Baldauf v. Davidson*, No. 1:04-cv-1571-JDT-TAB, 2007 WL 1202911, at *4 (S.D. Ind. Apr. 23, 2007) (hereinafter *Baldauf I*) (existence of probable cause as to battery). The court accordingly granted summary judgment in the defendant's favor. *Baldauf II*, 2007 WL 2156065, at *6.

c. In *Laning v. Doyle*, No. 3:14-cv-24, 2015 WL 710427 (S.D. Ohio Feb. 18, 2015), a 63-year-old woman was directed to pull over in a strip mall parking lot for a traffic violation. *Id.* at *1. She did not immediately stop once the officer "activated the lights on his police cruiser"; instead, she kept driving through the parking lot and parked outside of her office. *Id.* After the plaintiff stepped out of her car, the defendant officer pointed his taser at her. *Id.* "[S]he asked why she was being detained," but he did not respond and instead forcefully arrested her, allegedly in retaliation for her question. *Id.* at *1, *14. On the way to the jail, the plaintiff alleged, the officer drove erratically—doing donuts in a parking lot—and verbally taunted her. *Id.* at *1. The court held that while it was not clearly established that the officer lacked probable cause to arrest the plaintiff for failing to comply with an officer based on her failure to immediately pull over, *id.* at *7–9, the allegations viewed in the light most favorable to her could support a finding that the officer retaliated against her for exercising her First Amendment right to "question[] why he had pulled her over," *id.* at *15.

d. In *Sebastian v. Ortiz*, No. 16-20501-CIV-MORENO, 2017 WL 4382010 (S.D. Fla. Sept. 29, 2017), the plaintiff was pulled over for speeding, but refused to grant the police permission to search his

car. *Id.* at *2. The police then removed the plaintiff from the car and handcuffed him. *Id.* The plaintiff told the police that they could not search his car because they did not have a warrant. *Id.* One of the officers "responded by asking him if he was a 'YouTube lawyer' or 'constitutionalist' and that they 'didn't need a warrant.'" *Id.* After a search revealed a gun that the plaintiff was licensed to carry as a security guard employed by Miami-Dade County, he was charged with two counts of resisting or obstructing an officer without violence, and one count of reckless display of a firearm. *Id.* at *2–3. The charges were abandoned, but the plaintiff pled guilty to speeding. *Id.* at *3. Following his arrest, the plaintiff lost his job and was unable to find another one as an armed security guard. *Id.* When the plaintiff brought suit alleging that "he was arrested in retaliation for asserting his rights," the court dismissed the claim on qualified immunity grounds, solely on the basis that there was probable cause that the plaintiff had been speeding. *Id.* at *5–6.

4. First Amendment retaliatory arrest actions are not limited to the context of police confrontations. As petitioner's case and the examples below demonstrate, such arrests often target citizens for criticizing the government.

a. In *Roper v. City of New York*, No. 15 Civ. 8899 (PAE), 2017 WL 2483813 (S.D.N.Y. June 7, 2017), two photographers filed First Amendment retaliatory arrest claims after being arrested during a Black Lives Matter protest in Times Square. *Id.* at *1, *3. One plaintiff was arrested "for standing in the street" after being told by police "to move from the street to the sidewalk"—but he could not do so because police

barricades and other officers were in the way. *Id.* at *1. The second plaintiff, a photojournalist, had crossed the street to find a restroom—but was arrested for disorderly conduct after he failed to use a crosswalk, even though police were blocking the crosswalks. *Id.* Because the police had probable cause to arrest the "plaintiffs for violating . . . traffic rules" relating to sidewalk use, the plaintiffs' retaliatory arrest claims had to be dismissed under Second Circuit law, "even assuming that compliance with the . . . [police's] dispersal orders was not realistically possible." *Id.* at *3–5.

b. In *Morse v. San Francisco Bay Area Rapid Transit District (BART)*, No. 12-cv-5289 JSC, 2014 WL 572352 (N.D. Cal. Feb. 11, 2014), a journalist brought a retaliatory arrest claim after he was arrested by a Bay Area Rapid Transit ("BART") Deputy Police Chief while documenting a peaceful protest. *Id.* at *1. The plaintiff had a history of writing and publishing articles critical of the BART police, even "openly mock[ing] and ridicul[ing] the agency and its officers." *Id.* at *1–4, *9. By the time of the plaintiff's arrest, he was "'personally acquainted' with leaders of the BART organization," leading the police to, before the protest where the plaintiff was arrested, distribute flyers identifying him and give orders to arrest him if he "'incite[d] a riot or act[ed] in a criminal manner.'" *Id.* at *2, *4. Ultimately, the plaintiff was the sole member of the media arrested for standing in front of a fare gate—even though his conduct was indistinguishable from that of other journalists at the protest. *Id.* at *6–7, *9–10. Although the officer had probable cause to arrest the plaintiff for hindering the operation of a rail line, the district court, after identifying the ample evidence suggestive of defend-

ants' retaliatory motive, denied the defendants' motion for summary judgment on the plaintiff's retaliatory arrest claim under Ninth Circuit law. *Id.* at *9–15.

c. In *Fernandes v. City of Jersey City*, Civ. No. 2:16-cv-07789-KM-JBC, 2017 WL 2799698 (D.N.J. June 27, 2017), a plaintiff brought a First Amendment retaliation claim after being forcibly removed from a City Council meeting at the mayor's request. *Id.* at *3, *9–11. A few months before that removal, the plaintiff and his wife obtained a construction permit and began to remodel their home. *Id.* at *2. But within days, City officials came onsite and ordered them to stop, "resulting in weather damage" to their home when they were unable to continue the project. *Id.* at *1–2. The plaintiff began attending City Council meetings and other public meetings to complain about the City's conduct. *Id.* at *3. At "one such meeting," the City Council President "accosted" the plaintiff; at another, the plaintiff was forcibly removed at the mayor's request even though, according to the plaintiff, he had not done anything to cause a disturbance. *Id.* The defendants argued that they did, in fact, have probable cause to remove him for causing a disturbance. *Id.* at *11. The court concluded that there was a genuine issue of material fact as to the existence of probable cause, and denied the defendant officers' motion to dismiss on qualified immunity grounds. *Id.* at *11, *15–16.

d. In *Galarnyk v. Fraser*, 687 F.3d 1070 (8th Cir. 2012), a bridge safety consultant criticized a government agency on a number of national news networks after a bridge collapsed in Minnesota, and later visited the collapse investigation command center to dis-

cuss his concerns with officials. *Id.* at 1071–72. After meeting with an official in one of the command center's trailers, he entered another trailer without permission and further criticized the government. *Id.* at 1072. He was asked to leave, and did. *Id.* But he was stopped by a law enforcement officer after he had begun to leave the site, and was arrested shortly thereafter. *Id.* at 1073. Despite the plaintiff's allegations that the officer who stopped him repeatedly commented to a colleague that the plaintiff needed to be "locked up" for speaking out about the bridge collapse on national television, *id.*, the Eighth Circuit affirmed the dismissal of the safety consultant's claim on summary judgment because there was probable cause that he had trespassed, *id.* at 1076.

e. In *Ballentine v. Las Vegas Metropolitan Police Department*, No. 2:14-cv-01584-APG-GWF, 2017 WL 3610609 (D. Nev. Aug. 21, 2017), members of an activist group filed First Amendment retaliation claims after they were arrested for chalking anti-police messages on the sidewalks near a police station and a courthouse. *Id.* at *1–4, *6. Two officers had cited the plaintiffs, but encouraged them to protest in other ways, such as through holding signs. *Id.* at *2. The Court granted summary judgment in the officers' favor, in light of the lack of evidence of any retaliatory intent on their part in issuing the citations. *Id.* at *6. The court denied summary judgment, however, to a third officer who prepared the declaration of arrest for the plaintiffs. *Id.* Among other things, he included the chalked messages' anti-police content in his declaration ("f*** pigs" and "f*** the cops"), and when he had encountered the plaintiffs chalking, instead of telling them to stop, "he took pictures of their activities and challenged the content of their messages by

disputing with the protestors the accuracy of their speech." *Id.* Even though the officer had reason to believe that there was probable cause that the plaintiffs had violated an anti-graffiti statute, *id.* at *1, *12, the court held that the retaliation claim survived under Ninth Circuit law because "a reasonable jury could conclude that [the officer] intended to chill the plaintiffs' anti-police messages . . . and that he would not have sought the warrants but for the content of the plaintiffs' speech," *id.* at *6.

B. Requiring A Plaintiff To Demonstrate The Absence Of Probable Cause Would Effectively Immunize Officials And Municipalities From Liability For Retaliatory Arrests.

1. The sheer number of minor infractions described above—carrying a shofar, failing to step onto a sidewalk, speeding, blocking a fare gate, or entering a trailer—demonstrates that many retaliatory arrests will likely be supported by probable cause that the arrestee committed some offense, however minor. Adopting a rule that the existence of probable cause bars the plaintiff's claim entirely will thus effectively immunize potentially retaliatory arrests from judicial scrutiny. The breadth of that immunity is confirmed by two additional, significant consequences of the Eleventh Circuit's rule.

First, because probable cause is an objective inquiry, *see Devenpeck v. Alford*, 543 U.S. 146, 153 (2004), defendants can raise multiple theories of probable cause in the hope that the court accepts one, pointing to alleged infractions that were not even on the officer's mind, or communicated to the plaintiff, at

the time of arrest. So in *Roper*, while the officers had originally arrested the plaintiffs for disorderly conduct at the Black Lives Matter protest, the court upheld the existence of "probable cause to arrest" them "for offenses relating to pedestrian traffic." 2017 WL 2483813, at *3–4. The court explained that "the relevant inquiry is 'whether probable cause existed to arrest for *any* crime,' not necessarily for the crimes cited by the officers or ultimately charged." *Id.* at *3 (emphasis added) (quoting *Marcavage v. City of N.Y.*, 689 F.3d 98, 109 (2d Cir. 2012)). And so the existence of probable cause that the plaintiffs had "violat[ed] . . . traffic rules" precluded their claim as a matter of law. *Id.* at *3–4.

Petitioner's case serves as a prime example of the troubling consequences of allowing probable cause to be a moving target. Petitioner filed a lawsuit against respondent City of Riviera Beach alleging the violation of government transparency laws, Pet. App. 17a—quintessentially protected speech under the First Amendment. *See Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731, 741 (1983). A few months later, when petitioner tried to speak at a City Council meeting, a Councilmember who had previously stated a desire to "intimidate" petitioner in response to the lawsuit ordered petitioner's arrest. Pet. App. 3a–4a. Petitioner was then charged with two crimes: disorderly conduct and resisting arrest. The prosecutor never pursued the charges. *Id.* at 4a.

In the course of this lawsuit challenging that retaliatory arrest, the district court determined that, as a matter of law, there was no probable cause as to *either* offense. *See* Pet. Br. 10 (citing J.A. 105, 108). So the City switched gears *during trial*, at the district

court's encouragement, alleging probable cause for two additional offenses that had not been raised up to that point, one of which was disturbance of a lawful assembly. *See id.* at 10–12 (citing J.A. 108–34). The Eleventh Circuit accepted that the existence of probable cause as to the newly identified offense of disturbance of a lawful assembly meant that petitioner's retaliatory arrest claim failed as a matter of law. Pet. App. 7a–9a, 11a. In the face of clear evidence that City officials acted with retaliatory intent and a significant question whether there was probable cause for the offenses for which petitioner was actually arrested, the City was able to defeat petitioner's claim by testing theories of probable cause until it hit on one that stuck.

Second, the Eleventh Circuit's "no probable cause" rule bars First Amendment retaliatory arrest claims in the face of probable cause even where there is strong evidence of a retaliatory motive. In other contexts, however, this Court has recognized that the touchstone of the First Amendment retaliation inquiry is the government's motive: "the government's reason for [taking adverse action] is what counts." *Heffernan*, 136 S. Ct. at 1418. That is because the government inflicts the relevant "constitutional harm"—discouraging citizens from engaging in protected speech—whenever it acts because of retaliatory animus. *Id.* at 1419.

Yet the "no probable cause" rule renders irrelevant even overwhelming evidence of retaliatory intent. Here, for example, petitioner's arrest was just one event in a longer string of reprisals committed by the City, much of which is documented in *Lozman v. City of Riviera Beach*, 568 U.S. 115, 118–19 (2013), and

discussed in petitioner's brief, *see* Pet. Br. 2–7. Removing any doubt as to retaliatory intent, the record below included Councilmember Wade's comments stating, in a closed-door session, that she wanted to "intimidate" petitioner and send him a "message" because of his lawsuit against the City. Pet. App. 3a, 18a. Yet even though the Eleventh Circuit concluded that petitioner "seems to have established a sufficient causal nexus between Councilperson Wade and the alleged constitutional injury of his arrest," *id.* at 10a, it held that the existence of probable cause rendered that conclusion irrelevant.

Similarly, the *Roper* plaintiffs could not pursue a retaliatory arrest claim even though one plaintiff, before he was arrested at the Black Lives Matter protest, "heard an NYPD supervisor instruct his officers to '[j]ust take somebody and put them in handcuffs.'" 2017 WL 2483813, at *1 (alteration in original). Galarnyk, the plaintiff bridge consultant, could not survive summary judgment on his retaliatory arrest claim despite the fact that one officer asserted repeatedly that Galarnyk needed to be "locked up" for sharing his views about the bridge collapse on national television. *Galarnyk*, 687 F.3d at 1073. And Baldauf, the plaintiff involved in a confrontation with a small-town police officer could not withstand summary judgment on her retaliatory arrest claim, even though the officer had told her following the confrontation that he was not going to arrest her, but changed course after she threatened to—and did—report the officer to the police chief. *Baldauf II*, 2007 WL 2156065, at *1, *4; *Baldauf I*, 2007 WL 1202911, at *1.

Because journalist Morse was arrested in California, his First Amendment retaliatory arrest claim against the BART Police could proceed despite the existence of probable cause for interfering with a rail line. *Morse*, 2014 WL 572352, at *11–15. But if he had been arrested in Florida instead, his claim would have failed as a matter of law—notwithstanding Morse's presentation of evidence that BART police officers knew of inflammatory articles he had written about them; had circulated flyers with an image of his face prior to the protest; and preemptively ordered his arrest if he did anything criminal. *Id.* at *3–4.

2. The more nuanced rule that petitioner advocates would avoid effectively immunizing retaliatory arrests, while giving factfinders the ability to distinguish between legitimate law enforcement activities and improper retaliation. Under the *Mt. Healthy* framework, the existence of probable cause would still be relevant evidence of the defendant's lack of retaliatory intent. *See* Pet. Br. 35–36. But the existence of probable cause, without more, would not categorically bar a plaintiff who is able to establish that she was in fact arrested in retaliation for her speech from seeking redress for that constitutional injury.

For instance, imagine that a police officer pulled over a driver for the stated reason that the car displayed a political bumper sticker that the officer found offensive. Upon checking the driver's information, the officer realized that the driver was subject to an outstanding felony warrant, and arrested her. If the driver subsequently brought a retaliatory arrest claim, the police officer would prevail under the *Mt. Healthy* framework (despite the direct evi-

dence of retaliatory intent), because he would be readily able to demonstrate that he would have arrested the driver even in the absence of retaliatory animus. *See* Pet. Br. 36–37; *Mt. Healthy*, 429 U.S. at 287. If, however, the driver is able to establish that the outstanding warrant was one for which she ordinarily would not have been arrested (for instance, because it had been automatically issued for a minor offense such as failure to appear), the outcome might be different. In that situation, the warrant would not establish that the officer would have made the arrest in the absence of retaliatory intent. *See* Pet. Br. 36–37.

The *Mt. Healthy* framework thus permits factfinders to consider probable cause, and to conclude based on the nature of that probable cause, as well as the surrounding circumstances, that the arrest should not give rise to liability because it reflected legitimate law enforcement concerns—even if retaliatory animus played some role in the encounter. But where the existence of probable cause does not rebut the inference that the arrest was driven by retaliatory intent rather than law enforcement objectives, petitioner's approach enables the factfinder to hold the defendant liable. Doing so in that circumstance furthers First Amendment values without undermining legitimate government interests.

3. By contrast, the consequence of permitting the existence of probable cause of any infraction to categorically bar First Amendment retaliatory arrest claims would be to give officials a blank check to use such arrests to punish disfavored speech. Given that officials would rarely, if ever, face liability for retaliatory arrests, such arrests could become an attractive

means of punishing or deterring criticism of the government.

That danger would be exacerbated by the relative ease with which officials may order or undertake an arrest. As in this case, a single official may order or execute an on-the-spot arrest of an individual who is engaging in speech. In that respect, retaliatory arrests are a much more readily available means of punishing speech than retaliatory prosecutions. As the Court explained in *Hartman*, to institute a retaliatory prosecution, an official with retaliatory animus must persuade the prosecutor to institute criminal process and to devote state resources to the prosecution. 547 U.S. at 261–64. Thus, *Hartman*'s holding that the plaintiff in a retaliatory prosecution case must establish the lack of probable cause does not give officials a particularly attractive means of retaliating against disfavored speech: prosecutions remain a cumbersome and costly mechanism for doing so. In the arrest context, however, applying *Hartman*'s "no probable cause" requirement would effectively insulate from liability the use of a readily available means of punishing speech.

C. Adopting The Court Of Appeals' "No Probable Cause" Requirement Would Chill The Exercise Of First Amendment Rights.

It is beyond dispute that the threat of being arrested for engaging in protected speech will deter First Amendment activities. Indeed, the very reason that "[o]fficial reprisal for protected speech" is prohibited is because "it threatens to inhibit exercise of the protected right." *Hartman*, 547 U.S. at 256 (quoting

Crawford-El, 523 U.S. at 588 n.10); *Ford v. City of Yakima*, 706 F.3d 1188, 1194 (9th Cir. 2013) ("[A] person of ordinary firmness would be chilled from future exercise of his First Amendment rights if he were booked and taken to jail in retaliation for his speech."). And such chilling extends beyond the target of government reprisal; retaliation against one individual "tells the others that they engage in protected activity at their peril." *Heffernan*, 136 S. Ct. at 1419.

An individual's ability to bring a First Amendment retaliatory arrest claim against vindictive government officials serves as an important check on such reprisal and the resultant chilling of protected activity. *See generally Morse*, 2014 WL 572352 (plaintiff journalist's claim for retaliatory arrest by BART police could move forward); *Ballentine v. Las Vegas Metro. Police Dep't*, 2017 WL 3610609 (plaintiff protestors' claim against officer who prepared declaration of arrest could move forward based on the officer's fixation on the content of the plaintiffs' messages); *see also Naveed v. City of San Jose*, No. 15-cv-05298-PSG, 2016 WL 2957147, at *1, *5–6 (N.D. Cal. May 23, 2016) (permitting First Amendment retaliatory arrest claim to proceed, despite the existence of probable cause to support the arrest, where the plaintiffs were arrested after attempting to film the police; and concluding that defendant officers' alleged "conduct would chill a person of ordinary firmness from future First Amendment activity"). Such suits help deter retaliatory conduct, making it less likely to happen in the future. And from the plaintiff's perspective, an after-the-fact damages suit is generally the only means she has to vindicate her rights after a retaliatory arrest.

But in jurisdictions where probable cause bars a First Amendment retaliatory arrest claim as a matter of law, this check is effectively absent. Again, this case crystallizes the issue: the decision below functionally gives officials carte blanche to order a citizen arrested for the express purpose of "intimidat[ing]" him from criticizing the government, Pet. App. 3a. Other residents of the City of Riviera Beach—not to mention other citizens, including members of amici organizations, across the State—could very well conclude that the danger of being arrested (and being taken to the police station, booked, and jailed) is simply too high a price to pay for the privilege of commenting on government policies or otherwise engaging in protected activity. *See, e.g.*, *Sebastian*, 2017 WL 4382010, at *2–3 (recounting that, after the police arrested the plaintiff, who worked as a security guard for Miami-Dade Transit, the police told him that "he would never return to his job with Miami-Dade County"; the plaintiff was, indeed, terminated from his job following the arrest). That chilling effect is precisely what the First Amendment guards against.

This risk of self-censoring is particularly acute in interactions between individuals and their local governments—especially in smaller cities and towns. In these smaller towns, citizens are much likelier to interact with government officials on a regular basis. Government critics are more likely to be known to officials—and police are more likely to have relationships with office holders. It is no coincidence that, in a number of the examples discussed above and in the instant case, the retaliatory arrests at issue were effected by local government officials in smaller cities and towns. *See, e.g.*, Public Data, GOOGLE,

goo.gl/dh55sP (last visited Dec. 21, 2017) (Riviera Beach, Florida, where petitioner Lozman was arrested, has a population of 34,244; Pittsboro, Indiana, where plaintiff Baldauf got into an altercation with a police officer in a convenience store, has a population of 3,283; Huber Heights, Ohio, where 63-year-old plaintiff Laning was pulled over, arrested, and forced to ride in a police car while the officer did "donuts," has a population of 38,019). The greater degree of interaction between citizens of smaller towns and their local governments gives rise to both increased opportunities for retaliation and more severe chill when retaliation occurs.

CONCLUSION

For the foregoing reasons, and for the reasons stated in petitioner's brief, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

—v.—

CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONER

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BRIEF OF INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech, previously known as the Center for Competitive Politics, is a nonpartisan, nonprofit organization that exists to protect and defend the First Amendment rights of speech, press, assembly, and petition. As part of that mission, the Institute represents individuals and civil society organizations *pro bono* in cases raising First Amendment objections to protected speech. The Institute has an interest in this case because arrests made in retaliation for the exercise of First Amendment rights are a particularly chilling form of governmental response to constitutionally protected but officially disfavored speech. It would imperil First Amendment interests of the most significant nature if such governmental misconduct, however egregious and whatever the circumstances, were immunized from judicial scrutiny whenever probable cause of a violation of law may be said to have existed.

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[1] Pursuant to Sup. Ct. Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Petitioner's blanket consent to the filing of *amicus* briefs, filed with the Court on December 19, 2017, and Respondent's written consent to the filing of this brief have been filed concurrently with this brief.

To avoid that result and to vindicate First Amendment principles of the highest order, the Institute for Free Speech submits this brief in support of petitioner Fane Lozman.

INTRODUCTION: *MT. HEALTHY* AND ITS PROGENY

The Court has long since articulated the framework within which the central issue of this case should be addressed. In *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), the Court determined that to state a claim for First Amendment retaliation, a plaintiff must show that: (1) her speech was constitutionally protected; (2) she suffered adverse conduct that would likely deter a person of ordinary firmness from engaging in such speech; and (3) in part, plaintiff's constitutionally protected activity motivated defendant's adverse action. *See id.* at 285-287. That decision further provides that once the plaintiff shows that her protected conduct was a motivating factor triggering the defendant's adverse conduct, the burden shifts to the defendant to show that it would have taken the same action in the absence of the protected conduct, in which case the defendant cannot be held liable. *Id.* at 287.

Application of *Mt. Healthy* neither requires nor permits lower courts to ignore the issue of probable cause. Rather, a court deciding a case governed by *Mt. Healthy* considers whether probable cause existed as a factor in its holistic assessment of the circumstances triggering the arrest. The more plausible the submission that the

cause of an arrest was official disapproval of protected speech, the more likely it is that a First Amendment retaliation claim will succeed. The less plausible, the less likely a juridical determination will follow that a First Amendment claim will carry the day.

Mt. Healthy focuses on the issue of motivation. What it does not do—what it rejects—is the notion that so long as there was probable cause for an arrest, it necessarily follows in all circumstances that a retaliation claim must fail. That result is all the more important in a nation awash in criminal statutes, one in which, as the brief submitted by the Institute for Justice in this case points out, an average Florida driver could easily be arrested for at least one moving violation every time she drives. Br. of *Amicus Curiae* Institute for Justice In Supp. of Pet. for Cert., 10-11.

In *Hartman* v. *Moore*, 547 U.S. 250 (2006), the Court deviated from the *Mt. Healthy* standard, adding a no-probable-cause element to retaliatory prosecution claims. In so holding, the Court emphasized that its rationale for deviating from the *Mt. Healthy* analysis was the "distinct problem of causation" naturally present in all retaliatory prosecution claims. *Id.* at 263. The causation problem identified by this Court is that a plaintiff bringing a retaliatory prosecution claim necessarily "must show that the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging." *Id.* at 262. By its nature, such a showing is exceedingly difficult because "the longstanding presumption of regularity accorded to

prosecutorial decisionmaking," *id.* at 263, makes the prosecutor's mind a black box—the court may not inquire into the subjective motivation of the prosecutor who brought the charges. As a result, the court must proceed on the basis that so long as probable cause for the prosecution existed, the underlying motivation of the state in commencing the prosecution may not be challenged without intruding into long-protected decisionmaking areas. There is no such "legal obstacle," as the court in *Hartman* put it, to inquiries into whether police or authorities who decide whether to arrest people for any of the multitudes of potential offenses that are embodied in legislation did so with the motivation of suppressing or punishing constitutionally protected speech. *See id.*

Mt. Healthy remains firmly established and is routinely applied in cases involving claims of First Amendment retaliation. Application of *Mt. Healthy* does not guarantee the success of a plaintiff alleging unconstitutional retaliation; application of *Hartman* assures its failure in any situation in which probable cause is held to exist. The core legal issue in this case is whether the *Mt. Healthy* standard should be applied in retaliatory arrest cases or whether the *Hartman* exception should carry the day. We urge the former result for reasons set forth in this submission.

ARGUMENT

I. SIGNIFICANT DEPRIVATIONS OF FIRST AMENDMENT RIGHTS WILL OCCUR IF THE EXISTENCE OF PROBABLE CAUSE FOR AN ARREST BARS, UNDER ALL CIRCUMSTANCES, ALL RETALIATORY ARREST CLAIMS

The answer to the question posed above is, we submit, most easily reached by reviewing a number of cases already decided by this Court and by various lower courts. The facts set forth in those cases illustrate the magnitude of the speech-destructive impact of a rule that a First Amendment retaliation claim may not be juridically entertained when probable cause exists of the violation of law by the party asserting the claim. We set forth the facts of four recent cases—one in a court of appeals and three in federal district courts—in the pages that follow. Before doing so, however, we consider the potential impact of such a rule in two cases previously heard and determined by this Court.

In both *Hill* v. *Colorado*, 530 U.S. 703 (2000) and *McCullen* v. *Coakley*, 134 S. Ct. 2518 (2014) this Court considered the constitutionality of state statutes that established buffer zones in which speech was significantly limited near abortion clinics. Both cases involved facial challenges under the First Amendment but both could, just as well, have arisen in the context of First Amendment retaliation claims. In the first case, individuals who sought to engage in "'sidewalk counseling'" for the asserted purpose of educating, counseling, persuading, or informing passersby

"'about abortion and abortion alternatives'" challenged the constitutionality of the statute. *Hill*, 530 U.S. at 708. In the second case, individuals who sought "to engage women approaching the clinics in . . . 'sidewalk counseling,' which involves offering information about alternatives to abortion" offered similar challenges to the statute. *McCullen*, 134 S. Ct. at 2527. This Court affirmed the constitutionality of the former statute and a dozen years later held the latter statute unconstitutional.

We do not seek in this brief to relitigate the constitutionality of either statute but simply to put before the Court the question of how it would have dealt with either case if the constitutionality of both statutes had been affirmed and if pro-life speakers had been able to demonstrate that while they had spoken within the designated zones in a matter inconsistent with the governing standard—thus providing a basis for a determination of probable cause of a violation—the statutes were, in practice, only being enforced as to them because of their views—thus providing a basis for determinations of retaliation against them for the exercise of their First Amendment rights. In fact, the dissenting opinions of Justices Scalia and Kennedy in *Hill* (530 U.S. at 741, 765) and the concurring opinions of Justices Scalia and Alito in *McCullen* (134 S. Ct. at 2541, 2548) urged that the statutes at issue were viewpoint-based and thus at odds with the First Amendment. Majorities on the Court in the two cases concluded that the statutes need not be so read. But had the anti-abortion activists whose speech was limited by the statutes at issue been victimized by retaliatory arrests based on the content of their speech,

adherence to the approach of the Eleventh Circuit in the *Lozman* case would have required dismissal of any First Amendment retaliation claims they might have asserted, simply because of the presence of probable cause of violations of those laws.

We do not believe such result is consistent with the First Amendment. But that is precisely what would be required if the Eleventh Circuit ruling in this case were affirmed. A review of lower court cases leads to the identical conclusion. We turn to those cases.

A. *Ford* v. *City of Yakima*, 706 F.3d 1188 (9th Cir. 2013)

In *Ford* v. *City of Yakima*, 706 F.3d 1188, 1190 (9th Cir. 2013), plaintiff Eddie Ford was listening to music while driving when he noticed a police car, driven by defendant Officer Ryan Urlacher, following him.[2] Ford stepped out of his car at a red light and asked Officer Urlacher why he was following him so closely. *Id.* Officer Urlacher told Ford to get back into his car and "go." *Id.* Moments later, Officer Urlacher pulled Ford over. *Id.* After parking, Ford emerged from his car yelling and told Office Urlacher that he believed the stop was racially motivated. *Id.* Officer Urlacher warned Ford to stay in the car or he would go to jail. *Id.* Ford heeded Officer Urlacher's warning. *Id.*

Officer Urlacher proceeded to tell another officer, "'I think I'm going to arrest [Ford] for [a]

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[2] The facts in the *Ford* case and others discussed in this brief are set forth in the opinions and court filings cited.

city noise ordinance violation right now. He might only get a ticket if he cooperates. But with that attitude, he's going to get cuffed.'" *Id.* Officer Urlacher next handcuffed Ford and made the following statements to him: "'Stop running the mouth and listen'"; "'If you talk over me, you are going to go to jail, sir. Do not talk over me'"; "'If you cooperate, I may let you go with a ticket today. If you run your mouth, I will book you in jail for it. Yes, I will, and I will tow your car'"; "'If you cooperate and shut your mouth, I'll give you a ticket and you can go.'" *Id.* at 1190-1191. Ford stopped yelling and proceeded to answer Officer Urlacher's questions with, "'Uh-huh'" and "'You do what you want.'" *Id.* at 1191.

After Ford expressed concern about getting to work, Officer Urlacher told him:

> "'Well that's not going to happen if you don't—if you keep running your mouth. Okay? If you have diarrhea of the mouth, you will go to jail. If you cooperate with us and treat us like human beings, we will treat you like a human being. Do you understand me?'" *Id.*

Officer Urlacher proceeded to tell a backup officer, "'I don't know if I'm going to book him yet. I'll see if he's going to shut up'" before telling fellow defendant Lieutenant Nolan Wentz, "'So he's under arrest for the city ordinance right now. If he shuts up, I'll let him go with a ticket.'" *Id.* Wentz then advised taking Ford to jail; Ulracher agreed.

While being driven by Officer Urlacher to the booking facility, Ford invoked his right to free

speech. In response, Officer Urlacher replied, in part:

> "'You're going to jail for numerous reasons. The crime you're going to jail for is the city noise ordinance. A lot of times we tend to cite and release people for that or we give warnings. However . . . you acted a fool . . . and we have discretion whether we can book or release you. *You talked yourself—your mouth and your attitude talked you into jail. Yes, it did.*'" *Id.* (emphasis in original).

Ultimately, the Ninth Circuit concluded that, because "a person of ordinary firmness would be chilled from future exercise of his First Amendment rights if he were booked and taken to jail in retaliation for his speech" that "a rational jury could find that the officers deterred or chilled the future exercise of Ford's First Amendment rights." *Id.* at 1194. The court then determined that "the facts establish[ed] that the officers' alleged conduct violated [Ford's] right to be free from police action motivated by retaliatory animus, even if probable cause existed for that action." *Id.* at 1195. After finding that the defendant officers were not entitled to qualified immunity, the court reversed the district court's granting of summary judgment and allowed Ford's claim to proceed to trial because he "put forth facts sufficient to allege a violation of his clearly established First Amendment right to be free from police action motivated by retaliatory animus, even if probable cause existed for that action." *Id.* at 1196.

B. *Gullick* v. *Ott*, 517 F. Supp. 2d 1063 (W.D. Wis. 2007)

In *Gullick* v. *Ott*, 517 F. Supp. 2d 1063 (W.D. Wis. 2007), plaintiff Thomas Gullick sued defendant deputy sheriff Terry Ott in his individual capacity for issuing him a citation in retaliation for supporting a particular political candidate. Gullick was well-known as a supporter of town-sheriff candidate Richard Bradner, and was "disliked by supporters of" Bradner's opponent, Dennis Richards. *Id* at 1065. Ott, on the other hand, was an avid supporter of Richards. *Id.* In fact, Ott's support was so strong that even before the incident giving rise to this case, another officer warned Gullick to "look out for" Ott. *Id.* at 1066. In this warning, the other officer said that Ott would treat Gullick unfairly were the two to ever have a dispute, because of their opposing political views. *Id.*

The interaction giving rise to the suit started when Ott saw Gullick standing on the side of the road near a sign that read: "Richards for Sheriff." *Id.* Ott pulled off to the side of the road, approached Gullick, and asked him why he was near the sign. *Id.* Gullick maintained he said that he was examining the sign to see whether it had been placed illegally on a public right of way; according to Ott, Gullick responded that he went near the sign to urinate. *Id.*

Shortly thereafter, Ott told Gullick to wait in his car while he took a look around. *Id.* Ott surveyed the area, and then contacted the sheriff's dispatch center to discuss the situation. *Id.* Ott identified Gullick to the dispatcher, and then described what he had seen. *Id.* In that

description Ott noted that the "Richards for Sheriff" sign was "bent over onto the ground." (Ott's supervisor, however, visited the scene later that night and found no such damage to the sign). *Id.*

With Gullick still waiting in his car, Ott started text-message conversations with two other officers. In one of the conversations, the other officer wrote that Gullick was "'a political fanatic,'" and that Ott should call him. *Id.* at 1067. Ott responded that he could not make the call, but that he was in search of the statute on public urination. *Id.* In the other conversation, the other officer asked whether Ott thought Gullick was the person responsible for the anti-Richards fliers that were placed around town.[3] *Id.*

After his conversation, Ott returned to Gullick, issued him a citation for public urination, and asked whether he could search his car for anti-Richards fliers.[4] *Id.* Gullick consented, and Ott searched Gullick's car to no avail. *Id.* All in all, the stop lasted a little over one hour. *Id.*

The court analyzed the absence of probable cause as one factor in its larger inquiry into whether the arrest was motivated by retaliatory animus, in accordance with the *Mt. Healthy*

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[3] While the stop was ongoing, Richards called his campaign manager to tell him that Gullick had been caught "'peeing on a sign or bending a sign.'" The manager responded that "'they finally caught'" Gullick. *Id.*

[4] In his police report, Ott wrote that he had searched Gullick's car for anti-Richards fliers in pursuit of "'evidence to support [his] case of criminal damage to a political sign.'" *Id.*

framework. The court found that parties' diametrically opposing viewpoints, the ominous warning to Gullick, the infrequency with which public-urination statutes are enforced (especially in rural areas), the dispute of fact as to the absence of probable cause, and the groundless search of Gullick's car all suggested that the factor driving Ott's decision to give Gullick a citation was actually Gullick's support of Bradner. *Id.* Summary judgment was thus denied to deputy sheriff Ott.

C. *Marlin* v. *City of New York*, 2016 WL 4939371 (S.D.N.Y. Sept. 7, 2016)

In *Marlin* v. *City of New York*, 2016 WL 4939371, at *2 (S.D.N.Y. Sept. 7, 2016), plaintiff Jason Marlin participated in the Occupy Wall Street demonstrations in New York City's Union Square. According to Marlin, he was aware that the park closed at midnight because fellow protestors had "mentioned it" to him. *Id.* at *2. However, he claimed that he did not believe that the part of Union Square in which he stood that night closed at midnight because it was not part of the park; plaintiff asserted that he was standing outside the park entrance in a public right-of-way. *Id.* at *2, *11.

Marlin alleged that he was arrested because police officers believed he was assisting another protestor who criticized the police. A female protestor standing next to Marlin was arrested after yelling, "'You should be ashamed of yourselves'" at the officers. *Id.* at *3. Seconds after the female protestor's arrest, one of the defendant officers alleged that Marlin was "helping" her and ordered his arrest. *Id.* Police affidavits maintained

that Marlin interfered with an ongoing arrest, and that he resisted arrest by refusing to place his arms behind his back and falling to the ground. *Id.* at *4.

Marlin had been charged with resisting arrest and obstruction of governmental administration. *Id.* The district court's analysis of his First Amendment retaliation claim focused entirely on the presence of probable cause for his commission of a different offense—violation of New York City park rules—because in the Second Circuit, "[t]he existence of probable cause will defeat a First Amendment claim, 'premised on the allegation that defendants prosecuted a plaintiff out of a retaliatory move.'" *Id.* at *14 (quoting *Fabrikant* v. *French*, 691 F.3d 193, 215 (2d Cir. 2012)). In its prior analysis of plaintiff's claim for false arrest, the court had already found that the defendant officers had probable cause to arrest Marlin for violating R.C.N.Y. § 1-03(a), which prohibits being in a city park after it is closed to the public. *Id.* at *9-*10. Reasoning that plaintiff was at least near "an entrance to the park" and that thus "arguable probable cause" existed for this violation, the court held that it saw no need to decide whether there was probable cause to arrest Marlin for a violation of any of the other park rules at issue or for the charges actually cited at the time of his arrest. *Id.* at *10-*11. So long as probable cause existed for *any* violation, the court concluded, the question was settled and no retaliation claim could survive. *Id.* at *10- *11, *14.

D. *Cranford* v. *Kluttz*, 2017 WL 4358761 (M.D.N.C. Sept. 30, 2017)

In *Cranford* v. *Kluttz*, 2017 WL 4358761, at *1 (M.D.N.C. Sept. 30, 2017), plaintiff Brian D. Cranford, a Christian "street preacher" who traveled his local area professing his interpretation of the Christian Bible on public streets, began preaching at the "Farmers' Day Festival," a street fair featuring a farmer's market and other local vendors. Defendant local police Chief Eddie Kluttz reassigned defendant Detective Reese Helms from general patrol duty and instructed him to observe Cranford, telling Detective Helms that "if [plaintiff] violates any law, he should be arrested." Excerpts of Dep. of Reese Helms at 17, 20, *Cranford* v. *Kluttz*, No. 15-cv-00987 (M.D.N.C., Dec. 1, 2016), ECF No. 31-3. When Detective Helms told Cranford he could not preach on Festival grounds or pass out literature inside festival grounds because he had not registered for a vendor booth, Cranford elected to stand near the boundary of the festival grounds, and preach to passersby, focusing on the topic that women who did not dress modestly were "whores and prostitutes." 2017 WL 4358761, at *17-*19.

After Cranford's preaching precipitated a "contentious" conversation with a specific festivalgoer, Detective Helms approached Cranford and told him, "'[y]ou're not gonna be disrespectful'" and "'don't start causing issue with the people. You can preach, but that has nothing to do with talking about people.'" *Id.* at *2. Detective Helms' instructions were evidently based on the North Carolina state statute prohibiting "[d]isorderly conduct," which included causing a public disturbance by "[m]ak[ing] or

us[ing] any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation." N.C. Gen. Stat. § 14–288.4(a)(2); 2017 WL 4358761, at *20.

Cranford continued to preach on the topic that women should dress modestly, at times addressing his comments to specific festivalgoers and at one point gesturing to Detective Helms' wife and family, stating

> "'All you ladies need to learn how to put on some clothes, too. I'm talkin' to her. I'm talkin' to your family members. And all of those ladies over there. The Bible says that a woman should dress modestly. See a lot of ladies out here dressed like tramps and whores and prostitutes today. The Bible says you dress modestly. Today all you ladies who's dressed half-nekkid out here.'" *Id.* at *3, *19.

Immediately before Cranford's arrest, he and Detective Helms had the following exchange:

> "Defendant Helms interrupted him, 'Sir, you cannot call people whores and prostitutes.' [Cranford] immediately responded, 'The Bible says it calls 'em whores and prostitutes.' Defendant Helms said, "If you say that one more time, I'ma place you under arrest' and [Cranford] again immediately responded, 'You can't be whores and prostitutes, you can't be.'" *Id.* at *3 (internal citations omitted).

Cranford filed multiple claims relating to his arrest, including a claim for First Amendment retaliation. In considering other claims, the court

found sufficient probable cause to confer qualified immunity on the defendants for a possible Fourth Amendment violation. *Id.* at *17-*19. The court acknowledged that the statements that precipitated Cranford's arrest could have been general professions of his interpretation of Biblical principles, but it also found that it was reasonable to conclude that Cranford may have intended his statements to provoke specific individuals. *Id.* at *17. The court found probable cause to arrest on the basis that Cranford was ultimately convicted of disorderly conduct by a state court. *Id.*

The court concluded that notwithstanding that it was "possible, at least theoretically, that Defendant Helms also acted in retaliation for [Cranford's] exercise of his First Amendment rights," *id.* at *21, Cranford could not state a claim against Detective Helms for retaliatory arrest due to the existence of probable cause.

* * * * *

The above cases, one from a court of appeals and three others from district courts, illustrate not only the wide range of circumstances in which claims of retaliatory arrests occur, but the vice of a *per se* rule barring all First Amendment retaliation claims so long as probable cause for an arrest existed. Marlin may have had a more attractive claim than Ford, Cranford than Gullick, but the enforcement of a rigid legal bar to the assertion of a retaliatory arrest claim in all four cases is indefensible.

II. ABSENT THE SPECIFIC CIRCUMSTANCES TRIGGERING THE *HARTMAN* EXCEPTION, *MT. HEALTHY* SHOULD BE APPLIED TO PERMIT VINDICATION OF CRITICAL FIRST AMENDMENT INTERESTS

The above cases also reveal that the framework articulated by this Court in *Mt. Healthy*, which considers probable cause, but does not allow its existence, in and of itself, to defeat a retaliatory arrest claim, should be followed. The *Mt. Healthy* framework, unlike that set forth in *Hartman*, allows the Court to make crucial inquiries into whether the communicative impact of protected speech impermissibly motivated an arrest. Courts cannot protect First Amendment rights using a mode of inquiry that does not permit them even to examine whether protected speech was targeted based on its communicative impact.

A. Retaliatory Arrest Cases Do Not Present Special Circumstances Requiring Absence of Probable Cause as a Proxy Inquiry

Most retaliatory arrest cases do not need the "gap-filling" analysis required in *Hartman* because, as illustrated by the cases above, the arresting officer and the government official with purported animus are one and the same. *See, e.g.*, *Ford* v. *City of Yakima*, *supra*; *Cranford* v. *Kluttz*, *supra*. Like the "ordinary retaliation claims" that the Court differentiated retaliatory prosecution claims from in *Hartman*, in these types of claims "the government agent allegedly harboring the animus is also the individual allegedly taking the adverse action." *Hartman*, 547 U.S. at 259. As the

government official harboring the animus is the executor of the arrest, there is no need to inquire into absence of probable cause to determine his motivation via a proxy analysis—his motivation can be examined directly.

The instant case, where another official instructed the arresting officer to effect Mr. Lozman's detention, may seem to present a different situation that involves the need to fill a gap because multiple actors are involved. However, in this and similar situations involving multiple government officials participating in and influencing the decision to arrest, unlike in a retaliatory prosecution claim, the court may still consider the actual motivation of the arresting officer. The "absence of probable cause" inquiry is not needed as a proxy where the court can inquire into the motivation of the arresting officer. The court can directly examine whether the governmental official making the arrest was substantially influenced by his or another government official's desire to retaliate against protected speech with which they disagreed. In retaliatory arrest cases, requiring plaintiff to negate the existence of probable cause fills no important function, and only serves to cut off the court from inquiring into whether the arrest was motivated by the communicative impact of protected speech.

B. The *Mt. Healthy* Framework Allows Courts to Determine Whether State Action Was Taken to Punish Protected Speech Because of Its Communicative Impact

The burden-shifting framework considers absence of probable cause as an element of the third *Mt. Healthy* factor: whether plaintiff's constitutionally protected activity motivated defendant's adverse action. This allows courts to consider absence of probable cause as an element of the inquiry, together with the officer's motivation, in order to determine the true motivation of the arrest. Where the court is not bound to search for any possible probable cause, and terminate its inquiry if probable cause is found, it is able better to assess whether the arrest was retaliatory. Permitting the court to consider absence of probable cause as just one element of the inquiry into the officer's motivation allows the court to more accurately assess whether the speech that triggered the arrest was protected or unprotected speech, and whether the arrest was based on the speech's message. *Ford* is illustrative of the benefits of formulating the inquiry in this fashion. There, the arresting officer explicitly told Ford that the real reason for his arrest was his argumentative attitude—not his violation of the noise ordinance. Ford was plausibly arrested not for his unprotected speech that triggered the arrest, but rather based on his later, protected speech, due to its message. Because the court did not have to stop its analysis once it found probable cause, it was able to determine that a jury could find that Ford was arrested for an impermissible retaliatory motive against his protected speech.

Gullick too shows that the *Mt. Healthy* framework allows the court to determine whether the arrest was actually triggered by retaliatory animus towards plaintiff's protected speech. Because the court understood that it was permitted to consider the existence of probable cause to arrest as part of its larger inquiry into the officer's motivation for arresting, it was able to determine that an officer who had demonstrated animus towards Gullick for his political speech and who had to look up the statute that was the basis for his charge could in fact have had a retaliatory motive

Gullick also demonstrates how examining the existence of probable cause as part of the larger inquiry into the arresting officer's motivation can reveal that the officer exercised discretion on a charge wholly unrelated to speech *because of* the arrestee's protected speech in a separate incident. Gullick pleaded facts supporting the proposition that the arresting officer was upset with his protected political speech prior to the incident for which he was arrested. In fact, other law enforcement officers had warned Gullick to look out for the officer who arrested him because of their political dispute. He was then arrested for public urination, a charge wholly unrelated to speech, which the court noted was very rarely enforced. By considering probable cause as part of the inquiry into the motivation to arrest, the court was able to take into account whether the discretionary decision to arrest was based on his protected speech. This Court has repeatedly found unconstitutional laws that provide the police with "unfettered discretion to arrest individuals for words or conduct that annoy or offend them," *City*

of Houston v. *Hill*, 482 U.S. 451, 465 (1987). The *Gullick* ruling was consistent with that determination.

C. Focusing Only on the Existence of Probable Cause Does Not Allow Courts to Consider Whether a State Action Was Taken to Punish Protected Speech Because of Its Communicative Impact

The First Amendment is not easily vindicated in circuits where the courts consider absence of probable cause not as a factor in its holistic assessment of the circumstances motivating an arrest, but as a single determinative element on which plaintiff's retaliation claim turns. In these circuits, the court may not even inquire into whether the arresting officer was at all influenced by the speaker's message, so long as probable cause exists for *any* reason—even a reason other than the charges cited at the time of arrest. *See, e.g.*, *Marlin*, 2016 WL 4939371. In determining whether probable cause exists for an arrest, courts evaluate whether the facts known by the arresting officer at the time of the arrest objectively provided probable cause to arrest. *Devenpeck* v. *Alford*, 543 U.S. 146, 153 (2004). Whether probable cause existed for the charge actually invoked by the arresting officer at the time of the arrest is irrelevant. *Id.* at 153-54. Once the court finds probable cause, the inquiry ceases, and the First Amendment retaliation claim is defeated, without the court even looking at whether the plaintiff had engaged in speech possibly deserving of constitutional protection, or if the officer took action based on the message plaintiff conveyed.

See Marlin, 2016 WL 4939371, at *14. Such a cursory inquiry runs contrary to this Court's First Amendment jurisprudence.

The First Amendment demands that courts must at least inquire into whether state action (1) targets protected speech, and (2) whether that speech was targeted because of its communicative impact. *See NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 915-16 (1982) ("The fact that [a non-violent, politically motivated boycott] is constitutionally protected, however, imposes a special obligation on this Court to examine critically the basis on which liability was imposed."). Even where this Court has upheld restrictions on conduct that have secondary effects on speech, it has first, as a threshold matter, analyzed whether or not the application of the law targeted the communicative impact of the conduct. *See United States* v. *O'Brien*, 391 U.S. 367, 381–82 (1968) ("In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct . . . . For this noncommunicative impact of his conduct, and for nothing else, he was convicted.").

As the above cases illustrate, for courts to analyze a cause of action for violation of First Amendment rights without even engaging in any of the most fundamental and basic inquiries this Court has developed to define the contours of that right is to slam the door on the First Amendment altogether.

In *Marlin*, the court did not even consider whether a protestor exercising his First Amendment rights in public, arguably on the

public sidewalk, was engaging in protected speech. It did not have to—indeed, was not permitted to—resolve the dispute between the protestors' version of events and the police officers' version, nor whether there was probable cause for the violations cited at the time of plaintiff's arrest. The court stopped considering the First Amendment retaliation claim once it concluded that there was only *arguable* probable cause that plaintiff broke a *different* law than the police cited at the time of his arrest. Protection of First Amendment rights requires greater judicial attention—especially as the increased prevalence of citizen recordings of the police provides courts with evidence of what truly occurred. *Cf.* Linda Zhang, *Retaliatory Arrests and the First Amendment: The Chilling Effects of* Hartman *v.* Moore *on Freedom of Speech in the Age of Civilian Vigilance*, 64 UCLA L. REV. 1328, 1363 (2017).

Cases such as *Marlin* demonstrate that in the circuits that bar retaliation claims unless probable cause is negated, the pro-life activists in the hypothetical we posited at the very beginning of this discussion would have no recourse to pursue such claims. If a clash of pro-choice and pro-life activists sparked a riot, the police would be free to arrest only the pro-life activists because of the presence of probable cause. Even if an officer acknowledged to all the pro-life activists that he rounded up, "I'm arresting only pro-life people because I think you're wrong," or "I'm arresting all you pro-life people because it's always you that start the trouble," the arrest could not be considered retaliatory so long as probable cause for the violation of law existed.

Cranford highlights a more nuanced problem presented by requiring the negation of probable cause as a prerequisite to asserting a retaliation claim. Since the court must tightly focus on whether probable cause existed at the point plaintiff was arrested, it may not consider whether the arresting officer's retaliatory animus shaped the entire scenario leading up to the arrest. In *Cranford*, the court confronted a situation where another court had already determined that Cranford's professions of his religious beliefs did ultimately cross the line into unprotected "fighting words." However, Cranford's unprotected statements were uttered *after* Cranford had already been targeted by and had verbal exchanges with law enforcement. Chief Kluttz had told Detective Helms to target Cranford for arrest. Detective Helms removed Cranford from the festival grounds, and had issued his own judgment on the content and viewpoint of Cranford's speech, telling him it was "disrespectful." Presumably, the speech that was "disrespectful" was protected speech that did not violate the disorderly conduct statute, as Detective Helms did not yet arrest Cranford at that point. Despite the potentially significant facts suggesting retaliatory motive, the court was not permitted to even consider whether Detective Helms and Chief Kluttz targeted Cranford based on their knowledge of his prior preaching and provoked him into ultimately violating the disorderly conduct statute, for, in the Fourth Circuit, once probable cause to arrest for any reason is found, the court may inquire no further. That is precisely why a rule imposing the far more holistic *Mt. Healthy* approach is needed.

CONCLUSION

For the reasons stated above, the Institute for Free Speech respectfully submits that this Court should reject any mode of analysis for First Amendment retaliatory arrest claims that ignores whether protected speech actually was or was not targeted based on its message. If the presence of probable cause alone defeats the existence of a First Amendment retaliatory arrest claim under all circumstances, arrests rooted in an effort to stifle protected speech will become judicially unscrutinized and undisturbed throughout the nation. Such a result risks impairing public confidence in both law enforcement and the judiciary at the same time it is irreconcilable with this Court's duty to protect First Amendment rights.

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No. 17-21

In the Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF INSTITUTE FOR JUSTICE AND CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The Federalist No. 17 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) 4

Inst. for Justice, *Eminent Domain in Disguise: Putting an End to Charlestown, Ind.'s Unconstitutional Home Inspection Scheme*,
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TABLE OF AUTHORITIES—continued

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Inst. for Justice, *Entrepreneur's Survival Guide* (Sept. 2014), perma.cc/-PFG5-BK54 2

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INTEREST OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT

The Institute for Justice (IJ) is a nonprofit public-interest law firm that litigates in support of greater judicial protection for individual rights, including citizens' First Amendment right to speak about issues of public concern in their communities.[1]

As part of its efforts, IJ works to empower citizens affected by local government policies to become activists for change. IJ has trained thousands of these activists in person, including more than 2,400 property rights activists whose homes or businesses were threatened with blight designations or eminent domain and more than 900 entrepreneurs whose businesses were negatively impacted by regulation. IJ has also worked with more than 150 communities of property owners and entrepreneurs who sought to change local law or oppose harmful proposed projects—including, for example, a group of food truck owners in Sarasota, Florida, fighting an ordinance prohibiting food trucks from operating within 800 feet of a brick-and-mortar restaurant without the owner's consent, and homeowners in a Charlestown, Indiana, neighborhood targeted for redevelopment.

In addition to training activists in person, IJ has assisted countless others by publishing "survival guides" for entrepreneurs and opponents of eminent domain to use in organizing grassroots political cam-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties have consented to this filing.

paigns in their communities. See, *e.g.*, Inst. for Justice, *Entrepreneur's Survival Guide* (Sept. 2014), perma.cc/PFG5-BK54. These guides instruct activists on how to advocate for change in local government policies, including how to speak out at local government meetings and legislative hearings.

The Cato Institute is a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato publishes books, studies, and the annual *Cato Supreme Court Review*, conducts conferences and forums, and files *amicus* briefs.

Amici have a strong interest in ensuring that courts are able to hold local governments accountable when they unlawfully arrest individuals in retaliation for exercising their First Amendment rights. The question presented here directly implicates that interest.

The court of appeals' holding that petitioner's retaliatory arrest claim was barred because the arrest was supported by probable cause was wrong and, if affirmed, will seriously erode Americans' ability to exercise their First Amendment rights. By foreclosing any judicial inquiry into the motivations behind an arrest—even where there is substantial evidence of a retaliatory motive—a probable cause bar would block a large number of meritorious retaliatory arrest claims. Moreover, by replacing the burden-shifting framework of *Mt. Healthy City School District Bd. of Education* v. *Doyle*, 429 U.S. 274 (1977), with a legal standard far more deferential to the government, the probable cause bar would encourage officials to retaliate through ar-

rests rather than by other means that would remain subject to meaningful First Amendment scrutiny.

Thus, affirming the lower court's decision would deter citizens from speaking on issues of public concern. Virtually everyone could be arrested for *some* offense, such as jaywalking or a traffic violation, if he or she fell into official disfavor, and a probable cause bar would ensure that any First Amendment claim based on such an arrest would fail. Faced with the risk of retaliatory arrest and likely deprived of any legal recourse, many citizen activists will censor themselves rather than speak out—a result that cannot be squared with the values that animate the First Amendment.

ARGUMENT

A. The question presented implicates important First Amendment values.

1. Democracy in America works when, and only when, members of the public are able to participate in every aspect of the political process. It is crucial that citizens be free not only to vote on Election Day but also to speak on issues of public concern and to express their views to their elected officials.

Citizen speech, as this Court has explained, is essential to democratic governance because it is the mechanism by which public opinion informs government action. The American system presupposes that politicians will be "cognizant of and responsive to [the] concerns" of their constituents; indeed, "[s]uch responsiveness is key to the very concept of self-governance through elected officials." *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1462 (2014). This responsiveness, in turn, depends on maintaining a culture of open and robust public discourse. See *Stromberg* v. *People of State of Cal.*, 283 U.S. 359, 369 (1931) ("The maintenance of the

opportunity for free political discussion to the end that government may be responsive to the will of the people * * *, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."). Public debate on critical issues indicates to elected officials what their constituents expect—and by drawing the public into the political process, it fosters a spirit of civic-mindedness.

That is nowhere more true than at the local level. "[P]articipation in local government is"—and has long been—"a cornerstone of American democracy." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part). As early as the 1830s, Alexis de Tocqueville found it "[i]ncontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies," where citizens learned, and exercised, the "manners and customs of a free people" by deliberating over solutions to local problems. *Id.* (quoting 1 Alexis de Tocqueville, *Democracy in America* 181 (H. Reeve trans. 1961)). And what was true then is still true today: Many people's political activity remains centered on city councils, school boards, and other local bodies.

It is no surprise that citizen participation is especially called for in local government. State and local governments, as Alexander Hamilton observed, "regulat[e] all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake." The Federalist No. 17, at 107 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Local governments decide when to invoke the power of eminent domain; they control the permissible uses of real property, through zoning laws; they regulate the terms on which businesses are permitted to operate; and much more besides. The decisions that local govern-

ments make on these issues rarely grab headlines outside of a particular community, but for the people affected by them, they are enormously consequential. Thus, it is vitally important that citizens be able to speak freely to their local government when it takes actions that may affect them.

2. Speaking one's mind to local government, however, is sometimes difficult. A person who expresses a view contrary to that of local officials may be received with indifference or outright hostility—particularly when the forces on the other side of an issue are well organized and well financed. Advocacy for change in local policies can thus be daunting for citizens unused to direct participation in the political process.

Citizen activists come from varied backgrounds and walks of life, but in general, they are people who have never been politically engaged before and who may not have a good understanding of how the political process works. They usually have become interested in local politics not for ideological reasons, but because a specific government policy is likely to impact their rights or their livelihood. They are also predominantly on the lower end of the economic ladder; many, for example, are first-generation immigrants seeking to establish small businesses,[2] or owners of modest homes who cannot afford to stay in their communities if forced from where they currently live.[3]

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[2] See *Clayton* v. *Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012) (first generation immigrant challenging application of Utah's cosmetology licensing law to her hair braiding business).

[3] See IJ, *Eminent Domain in Disguise: Putting an End to Charlestown, Ind.'s Unconstitutional Home Inspection Scheme*, perma.cc/UJ7R-QVEN (describing IJ's opposition to attempts to oust the residents of a working-class neighborhood targeted for redevelopment).

The experiences of these would-be activists allow them to offer a vitally important perspective on the impact of local government policies on people's lives, in areas ranging from business licensing and regulation to eminent domain to education policy. They also have the strongest motivation of anyone in their communities to put in the time and effort needed to speak out on those issues and organize campaigns for or against particular measures or legislation. But given their political inexperience and economic vulnerability, these activists are particularly susceptible to being deterred from speaking if they believe that they will face repercussions for doing so.

B. Barring claims for retaliatory arrest where probable cause exists would severely chill First Amendment activity.

A categorical bar on First Amendment retaliation claims for arrests supported by probable cause would deal a serious blow to First Amendment freedoms. Under that approach, courts would be forbidden from undertaking the same kind of inquiry into the government's motives that they perform without difficulty in other First Amendment retaliation cases. Such an approach would encourage local governments to deal with dissenters through arrests, rather than other kinds of retaliation that draw meaningful First Amendment scrutiny—which, in turn, would exert a serious chill on activists' protected political speech.

1. A categorical probable-cause bar would prevent courts from identifying the true motive behind government retaliation.

Like many other constitutional doctrines, the First Amendment's protection against government retaliation for individuals' speech implicates courts in the task of determining the motivation for state action. In

some areas of law, such as economic regulation, courts are highly deferential in assessing the government's or the legislature's intent, upholding state action as long as a conceivably rational basis for the government's decision exists—a test that is satisfied in all but "rare case[s]." See, *e.g.*, *Armour* v. *City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2080, 2084 (2012). But in First Amendment retaliation cases, courts take a much harder look at governmental intent.

In these cases, under the burden-shifting framework of *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977), plaintiffs need only show that their protected First Amendment activity was a "motivating factor" behind government action against them in order to make out a prima facie case of retaliation. The burden then shifts to the government to show, by a preponderance of the evidence, "that it would have reached the same decision * * * even in the absence of the protected conduct." *Id.* This framework enables courts to hold government officials accountable for retaliation when they act with unlawful motives, while allowing official actions to stand when they would have been taken even absent any retaliation. And as petitioner notes, courts have applied that test in countless cases—including retaliatory-arrest cases—without difficulty. Pet. 23-25.

Under the approach favored by respondent and the court below, however, no inquiry into governmental intent ever occurs, because a retaliatory arrest claim is categorically barred as long as probable cause for the arrest existed. Pet. App. 7a-8a; see also, *e.g.*, *Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002) ("Whatever the officers' motivation, * * * the existence of probable cause to arrest [the plaintiff] defeats her First Amendment claim."). The result is to insulate officials

from liability even where the circumstances of an arrest strongly indicate a retaliatory motive.

Indeed, that is precisely what happened here. Before the arrest at issue here, city council members had suggested "intimidat[ing]" petitioner and making him feel "heat" due to his opposition to the city's redevelopment plan. Pet. App. 3a. The city had also made petitioner "the target of a string of legal pressures," including attempting to evict him from the local marina (an action that a jury found was retaliation for petitioner's First Amendment activity), arresting him and removing him from a different council meeting, and much more. *Id.* at 19a-20a; see also Pet. 4. These facts make out a compelling case that petitioner's arrest was retaliation for petitioner's engagement in conduct protected by the First Amendment—yet the question of the city council's retaliatory intent became a moot one in light of the jury's finding of probable cause.

The protection afforded to First Amendment rights should not turn on the method by which the government infringes them—but that is the result of an approach that requires judges and juries to close their eyes to the improper motive behind retaliatory arrests. In circumstances like these, there is no compelling reason to preclude the trier of fact from assessing the motivation for an arrest and to hold the defendant liable if the arrest is found to have been in retaliation for First Amendment activity.

2. A categorical probable-cause bar unduly chills First Amendment activity.

Given that a probable cause bar would preclude many meritorious claims for retaliatory arrest from going forward (by precluding scrutiny of the motivation for the arrest), there can be no doubt that the bar would also severely chill First Amendment activity.

To start, this Court has often recognized that official retaliation for the exercise of First Amendment rights "offends the Constitution" by "threaten[ing] to inhibit exercise of the protected right." *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006) (quoting *Crawford-El* v. *Britton*, 523 U.S. 574, 588 n.10 (1998)); see also, *e.g.*, *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972) (noting that if the government could take adverse action based on an individuals' First Amendment activity, "his exercise of those freedoms would in effect be penalized and inhibited"). Retaliation puts a person to the intolerable choice of speaking out and facing personal jeopardy on the one hand, and refraining from protected speech and advocacy on the other. Faced with that choice, all but the most courageous individuals will refrain from speaking—undermining the "uninhibited, robust, and wide-open" debate on public issues that the First Amendment protects above all else. *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (noting that public debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

Retaliatory *arrest*, moreover, is one of the most fearsome tools for reprisal available to the government. It is often easy for the government to find a legal pretext on which to arrest someone who has become politically troublesome. Pet. 16-17. For example, the offense that was ultimately put forth as the basis for petitioner's arrest—"disturbing a lawful assembly"—requires only that a person act with reckless disregard for whether his or her conduct "impede[s] the successful functioning of the assembly." Pet. App. 61a. That vague standard could sweep up virtually anyone who speaks passionately on an issue or proposed measure at a local government meeting.

Beyond the confines of city hall, moreover, state and local statute books are filled with prohibitory statutes that residents honor principally in the breach and that might serve as bases for a retaliatory arrest. To cite just one set of examples, many typically absent-minded Floridians could be placed under arrest *every* time they drive a car, including for:

- driving over the posted speed limit (Fla. Stat. § 316.183);
- turning or changing lanes without signaling (*id.* § 316.155(1));
- parking more than 12 inches from the curb (*id.* § 316.195);
- making an U-turn in the presence of a sign prohibiting U-turns (*id.* § 316.1515);
- failing to stop in advance of "a clearly marked stop line" (*id.* § 316.123(2)(a));
- driving with a broken tail light (*id.* § 316.221(1)); or
- following another vehicle "more closely than is reasonable and prudent." *Id.* § 316.0895(1).

Laws like these are not ordinarily enforced with anything approaching regularity, but they would provide a ready basis for arresting a person targeted for official retaliation.

And once an arrest is made—even for a trivial offense—the potential consequences are serious:

> A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief. The arrestee is subject to a full search of her person and confiscation of her possessions. * * * The arrestee may be detained for up to 48 hours

> without having a magistrate determine whether there in fact was probable cause for the arrest. Because people arrested for all types of violent and nonviolent offenses may be housed together awaiting such review, this detention period is potentially dangerous. And once the period of custody is over, the fact of the arrest is a permanent part of the public record.

Atwater v. *City of Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting) (citations omitted); *id.* at 346 (majority opinion) (acknowledging that, at a minimum, custodial arrests present the opportunity for "gratuitous humiliation[]" of the arrestee). Thus, if government actions such as termination from a job or denial of a benefit chill First Amendment activity, *a fortiori* retaliatory arrests will have that effect.

Given the potency of retaliatory arrest as a means of political retribution, it is clear that a probable-cause bar will have a profound chilling effect on First Amendment activity. That is so for two reasons. First, as we have shown, by effectively precluding governmental liability for retaliatory arrest as long as probable cause is present, the bar ensures that many instances of unlawful retaliation will go unredressed. And second, by making it much harder to prove a claim for retaliatory arrest than for other retaliatory conduct, the bar encourages the government to retaliate by way of arrests, rather than other means.

The facts of this case prove the point. Had the city acted against petitioner in virtually any other way, his retaliation claim would have been evaluated under the *Mt. Healthy* standard, and he might have prevailed. But because petitioner's claim was for retaliatory *arrest*, it was doomed to failure unless he could show the absence of probable cause. In other words, the city was

better off having arrested petitioner than it would have been if it took virtually any other retaliatory action. If this Court affirms the decision below, the lesson will not be lost on other local governments seeking to silence nettlesome political activists.

The chilling effect of an increase in retaliatory arrests will be particularly felt by those who, like petitioner, might wish to speak out at city council or other local government meetings. Although public meetings provide citizens the opportunity to meet face to face with government officials and express their views, they face a heightened risk that, in the process of doing so, they will become known to officials and incur their displeasure. And if those officials elect to order the arrest of a person who speaks out, they have numerous potential bases for doing so before a meeting even concludes: during the events of this case, the city cited *three* different offenses as the grounds for petitioner's arrest at the city council meeting, including one (disturbing an assembly) that it failed to identify until during the trial, eight years later. See Pet. 8.

The prospect of this kind of reprisal will surely deter many would-be activists from speaking out on public issues. As explained above, many people concerned about local government policies are political novices who find public advocacy daunting. If they believe that officials can retaliate against them by ordering pretextual arrests, these individuals will either censor their political speech or refrain from speaking altogether—to their own detriment and to the detriment of the community that is deprived of hearing their views. The First Amendment cannot abide that result.

C. Retaliatory arrests are a greater threat to First Amendment activity than retaliatory prosecutions.

In saying all this, we are mindful that the Court, in *Hartman* v. *Moore*, 547 U.S. 250, 265-66 (2006), held that probable cause is a bar to a retaliatory prosecution claim. We agree with petitioner that extension of *Hartman*'s rule to the arrest context is unwarranted as a legal matter because *Hartman*'s logic does not apply in the context of retaliatory arrests. See Pet. Br. 36-48. But as a factual matter, too, retaliatory arrests and retaliatory prosecutions are different matters altogether—and extending *Hartman*'s rule to the retaliatory arrest context would pose a far greater threat to protected speech.

The decision whether to prosecute is a weighty one, made after multiple levels of review by multiple officials. A police officer cannot alone make the decision. Instead, a line attorney in the prosecutor's office typically coordinates with the police or other law enforcement officers before making a recommendation to his or her superior. The decision whether to prosecute then ordinarily requires the approval of one or more senior officials before an indictment is filed in the name of the state district attorney or U.S. Attorney or handed up by a grand jury. These layers of review better ensure that decisions to prosecute are thoughtful and deliberate, and not the product of whim or malice.

By contrast, the decision whether or not to arrest is typically made in the heat of the moment by a single police officer, with little to constrain his or her discretion. Indeed, as we demonstrated above (at 9-10), the grounds for probable cause necessary for a lawful arrest are hardly a safeguard against capricious or abu-

sive conduct—jaywalking, speeding, and disorderly conduct are enough.

Arrest is also an easier means of retaliation in light of the difference in the legal standards applied to arrests and prosecutions. An officer need only have probable cause to believe that a crime has been committed to arrest an individual. See, *e.g.*, *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004). A decision to prosecute requires more: Under generally accepted principles, a prosecutor should bring criminal charges only if they are supported by probable cause *and* "admissible evidence will be sufficient to support conviction beyond a reasonable doubt." See Standards for Criminal Justice § 3-4.3(a) (ABA 2015). A retaliatory arrest thus may on its face appear lawful, even reasonable, where a retaliatory prosecution would not.

In short, affirming the lower court here has far greater potential to chill activists and political organizers than might have the Court's decision in *Hartman*. That counsels strongly against respondent's bid to extend *Hartman*'s rule to retaliatory arrests.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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No. 17-21

In the Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* FOR MARION B. BRECHNER FIRST AMENDMENT PROJECT AND BRECHNER CENTER FOR FREEDOM OF INFORMATION IN SUPPORT OF PETITIONER

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Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
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Texas v. Johnson,
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Utah v. Strieff,
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134 S. Ct. 2056 (2014) 5

CONSTITUTIONAL PROVISION

U.S. Const. amend. I ..... *passim*

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OTHER AUTHORITIES

Hailey Branson-Potts, *Man Sues City After His Arrest*, L.A. Times, Dec. 3, 2017 ..... 3, 4

Clay Calvert, *The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward*, 3 Tex. A&M L. Rev. 131 (2015) 6, 7

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Bob Dunn, *State Drops Disturbing-the-Peace Charges Against Craig C. Gaetani*, Berkshire Eagle (Pittsfield, Mass.), Dec. 16, 2017 4

Katherine Grace Howard, *You Have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause*, 51 Ga. L. Rev. 607 (2017) ... 6

Frank LoMonte, *Legal Analysis: Can School Boards Restrict Public Comments?*, Student Press Law Center, Feb. 21, 2017, http://bit.ly/2pbdyPg 2

Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948) 7, 8

David Pierson, *Trump is Sued for Blocking Some Twitter Followers*, L.A. Times, July 12, 2017 ... 9

Robert D. Richards, *Freedom's Voice: The Perilous Present and Uncertain Future of the First Amendment* (1998) 13

Randolph A. Robinson II, *Policing the Police: Protecting Civil Remedies in Cases of Retaliatory Arrest*, 89 Denv. L. Rev. 499 (2012) 13

Michael Shepherd, *ACLU Sues LePage for Blocking Facebook Critics*, Bangor Daily News, Aug. 8, 2017, https://bangordailynews.com/2017/08/08/politics/aclu-sues-lepage-for-blocking-facebook-critics/ 10

Ovetta Wiggins & Fenit Nirappil, *Hogan Team Busy Blocking Facebook Posts Since Trump Order*, Wash. Post, Feb. 9, 2017 10

INTERESTS OF *AMICI CURIAE*[1]

The Marion B. Brechner First Amendment Project (the "Project") in the College of Journalism and Communications at the University of Florida in Gainesville is an endowed project dedicated to contemporary issues affecting the First Amendment freedoms of speech, press, thought, assembly and petition. The Project pursues its mission through a wide range of scholarly and educational activities benefiting scholars, students and the public. The Project's scholarly and educational interest in filing this amicus brief is to bring to the Court's attention important First Amendment principles on First Amendment retaliation claims, political speech, speech about matters of public concern, viewpoint discrimination and the right to petition the government for a redress of grievances. The Project is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

The Brechner Center for Freedom of Information (the "Brechner Center") in the College of Journalism and Communications at the University of Florida in Gainesville exists to advance understanding, appreciation and support for freedom of information in

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for either party in this case authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

the state of Florida, the nation and the world. The Center's focus on encouraging public participation in government decision-making is grounded in the belief that a core value of the First Amendment is its contribution to democratic governance. Since its founding in 1977, the Brechner Center has served as a source of academic research and expertise about the law of gathering news, and the Center's legal staff is frequently called on to offer interpretive guidance about the rights of journalists in Florida and throughout the country. The Center is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

Additionally, both the Project and the Center, as Florida-headquartered organizations, have a special interest in this case because it directly affects the First Amendment speech and petition rights of a Floridian, Fane Lozman.

SUMMARY OF ARGUMENT

This case is about much more than a retaliatory arrest and probable cause. At its heart, it is about twin fundamental First Amendment rights. The first is the right of all citizens to speak out as citizen-critics of government officials and to freely engage in speech about matters of public concern. See *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014) ("Speech by citizens on matters of public concern lies at the heart of the First Amendment . . ."); Frank LoMonte, *Legal Analysis: Can School Boards Restrict Public Comments?*, Student Press Law Center, Feb. 21, 2017, http://bit.ly/2pbdyPg ("The ability to speak directly to a government board –

a city council, a school board, college trustees – is perhaps the purest and most basic form of citizen participation.")

The second is the right of all citizens to petition the government for a redress of grievances with neithe. fear nor trepidation of retaliation or retribution for expressing their viewpoints, regardless of how disagreeable or disturbing those stances may be to government officials. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

If this Court holds that the existence of probable cause to make an arrest defeats a First Amendment retaliation claim, then the speech and petition rights of citizen-critics everywhere will be more easily quashed by government officials harboring nefarious, self-serving motives. Additionally, the chilling effect would be immense on aspiring, would-be citizen-critics who might steer well clear of controversy – and a degrading, humiliating arrest that can haunt one's life forever, even if the charges are later dropped – by engaging in self-censorship. See *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) ("Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the 'civil death' of discrimination by employers, landlords, and whoever else conducts a background check"). And, unfortunately, arrests for speaking up and attempting to speak up at city council meetings are not rare. See, e.g., Hailey Branson-Potts, *Man Sues City After His*

Arrest, L.A. Times, Dec. 3, 2017, at B4 (describing the arrest of Arthur Christopher Schaper at a June 2017 meeting of the Huntington Park, California, City Council on suspicion of two misdemeanor counts of disturbing a public meeting and disobeying a police officer); Bob Dunn, *State Drops Disturbing-the-Peace Charges Against Craig C. Gaetani*, Berkshire Eagle (Pittsfield, Mass.), Dec. 16, 2017, at B10 (describing the arrest of Craig C. Gaetani at a North Adams, Massachusetts, "City Council meeting after he allegedly caused a disturbance after being denied the opportunity to air comments after the public comment portion of that meeting had closed").

Instead of adding a probable cause hurdle to the citizen-critic's retaliatory-arrest burden, the well-established, burden-shifting test articulated by this Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), has provided a workable framework for four decades that strikes an appropriate equilibrium between the competing interests.

The *Mt. Healthy* standard comports with this Court's recognition of importance of protecting speech critical of the government. As the Court explained more than a half-century ago, there is a "privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer." *New York Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964). Fane Lozman is the quintessential citizen-critic of government. He was exercising his right and duty to decry and condemn perceived government misconduct and corruption when his arrest at a city council meeting was orchestrated by the respondent.

Perhaps even more troubling, this case involves viewpoint-based discrimination by the government against the speech of a citizen-critic. Specifically, an arrest occurred because a citizen's views were critical of, rather than favorable to, the government.

This Court "disfavors viewpoint-based discrimination." *Wood v. Moss*, 134 S. Ct. 2056, 2061 (2014). As Justice Anthony Kennedy explained just last term, viewpoint discrimination is "a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny." *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring).

Had Fane Lozman been lauding or praising the government, he would not have been arrested. But because he was critical of the government, he was arrested. As Justice Kennedy put it in *Tam*, this "reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination." *Ibid.* at 1766. Put differently, only speech favorable to the government was permitted in the political marketplace of ideas that is a city council meeting. That smacks of dictatorship, not democracy.

Additionally, this is a case about political speech, centering on an arrest made at a city council meeting once a citizen began to talk during the public comment period about alleged local government corruption. Political speech is at the core of the First Amendment. As this Court recently observed, "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 339 (2010). Simply put, respondent did not want petitioner to hold

government officials – itself, in other words – accountable.

Alleged government corruption is, of course, a matter of public concern. Speech about matters of public concern, in turn, is perched at the top of the hierarchy of First Amendment values, meriting special protection. *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011). In fact, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

Finally, this case raises First Amendment free press concerns, not simply free speech and petition interests. That's because its outcome will directly affect journalists who are arrested by police in retaliation for covering protests about alleged police misconduct and other issues. Recent years have seen journalists arrested on charges such as trespass and interference with police merely because law enforcement officials either did not like or were afraid of the negative media publicity. Katherine Grace Howard, *You Have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause*, 51 Ga. L. Rev. 607, 625-26 (2017). Furthermore, common citizens, acting as citizen-journalists and armed with nothing more than smartphones, have suffered retaliatory actions, including arrests and having their phones smashed, simply for filming police in public places performing their jobs. See generally Clay Calvert, *The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?*, 64 UCLA L. Rev. Disc. 230 (2016); Clay Calvert, *The First Amendment Right to*

Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward, 3 Tex. A&M L. Rev. 131 (2015). The rule this Court adopts here thus will directly impact the ability of both professional reporters and citizen-journalists to hold police accountable for possible misconduct.

In summary, this case involves core political speech, matters of public concern and, regrettably, viewpoint discrimination in the marketplace of ideas exercised by government officials that led to the retaliatory arrest of a consummate citizen-critic. Requiring the citizen-critic to prove the arrest was not premised upon probable cause unnecessarily tilts the scales of justice against the citizen-critic and in favor of the government. This Court's burden-shifting test from *Mt. Healthy* provides a workable doctrinal standard that much more fairly balances the interests of the citizen-critic and the government.

ARGUMENT

I. Core First Amendment Rights of Citizen-Critics Speaking in Dissent Must be Protected from Retaliatory Arrests and Viewpoint Discrimination

Petitioner Fane Lozman was arrested for exercising his core First Amendment rights of speech and petition during the public comment period at a city council meeting. Philosopher and educator Alexander Meiklejohn famously used "the traditional American town meeting" more than sixty-five years ago to emphasize that the primary purpose of free speech "is self-government." Alexander Meiklejohn, *Free Speech*

and Its Relation to Self-Government 22-23 (1948). As Meiklejohn explained, "Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unabridged." Ibid. at 22.

Respondent, however, had the petitioner ejected from the meeting via arrest. Clearly respondent failed to treat petitioner as a political equal in a nation where, as Meiklejohn put it, "[t]here is only one group – the self-governing people. Rulers and ruled are the same individuals." Ibid at 6. Instead, respondent treated petitioner as a thorn in its side, ready to be tweezed for removal.

Justice Kennedy observed last term that "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Yet petitioner was denied access via arrest by respondent to speak at precisely a place where dissenting speech is most needed – a public meeting of a governmental entity.

Put differently, respondent objected to petitioner's thoughts as expressed through speech. This is decidedly dangerous. As Justice Kennedy explained more than fifteen years ago, "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234,

253 (2002). The "impermissible end" in petitioner's case was to stifle his criticism and dissent of the government.

It also is important to recognize that this Court's crucial case carving out special protection for the citizen-critic of government, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), hinged on an advertisement that questioned the validity of the arrests of Martin Luther King, Jr. The advertisement asserted, in pertinent part, that "[a]gain and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times for 'speeding,' 'loitering' and similar 'offenses.'" Ibid. at 257-58. As the scare quotes surrounding the words speeding, loitering and offenses make clear, arrests targeting individuals who oppose governmental authorities can be easily conjured up, regardless of merit. Indeed, this was precisely the case with the arrest of petitioner Fane Lozman.

Furthermore, and in terms of the larger First Amendment context and climate today, this case arrives at the Court when citizen-critics of government officials are under siege. President Donald J. Trump, for example, routinely blocks from his Twitter account individuals who criticize him, sparking First Amendment free speech and petition concerns and, in turn, a lawsuit. David Pierson, *Trump is Sued for Blocking Some Twitter Followers*, L.A. Times, July 12, 2017, at C2. Sad, but his actions are not isolated.

For instance, Maryland Governor Larry Hogan has blocked at least 450 people from posting on his

Facebook page. Ovetta Wiggins & Fenit Nirappil, *Hogan Team Busy Blocking Facebook Posts Since Trump Order*, Wash. Post, Feb. 9, 2017, at B1. Maine Governor Paul LePage was sued in 2017 for "blocking two critical commenters from his Facebook page and deleting their comments." Michael Shepherd, *ACLU Sues LePage for Blocking Facebook Critics*, Bangor Daily News, Aug. 8, 2017, https://bangordailynews.com/2017/08/08/politics/aclu-sues-lepage-for-blocking-facebook-critics/. During a campaign rally in March 2016, then-candidate Trump yelled "Get 'em out of here" at protestors who, in turn, were assaulted by several Trump supporters. *In re Donald J. Trump*, 874 F.3d 948, 950 (6th Cir. 2017).

The bottom line is that a decision by this Court adding a probable-cause hurdle to the plaintiff's burden in a retaliatory-arrest case – especially given the deference often paid to the decisions of law enforcement officials – provides the government with much wider and, in fact, unnecessary berth to engage in viewpoint-based discrimination against core political speech with which it disagrees. As the next part explains, the test from *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), already provides an appropriate, workable framework for analyzing such cases.

II. The *Mt. Healthy* Test Strikes the Appropriate Balance Between First Amendment Interests and Legitimate Arrests Without the Addition of a Probable Cause Hurdle

In *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), this Court developed a burden-shifting framework for addressing First Amendment

retaliation claims within the context of employer-employee relationships. Under this test, plaintiffs initially carry the burden of demonstrating that they were exercising a constitutionally protected right and that, in turn, the exercise of this right was a motivating factor for a meaningfully adverse retaliatory action taken by the government. Ibid. at 287. More simply put, plaintiffs must show three elements in a First Amendment retaliation case – speech, causation and injury. In other words, their exercise of a protected First Amendment right (speech) was a motivating factor (causation) that resulted in harm (injury) suffered at the hands of the government.

Clearing this threshold in the face of a government motion to dismiss is not a simple matter for plaintiffs today, particularly after this Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Plaintiffs now must plead something greater than just "labels and conclusions" and something "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. In fact, "only a complaint that states a plausible claim for relief survives a motion to dismiss." Ibid. at 679. To reach this crucial threshold of plausibility – a level higher than mere conceivability – plaintiffs must set forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ibid. at 678.

If plaintiffs satisfy these steps of the *Mt. Healthy* test, then the burden shifts to the government to show "by a preponderance of the evidence that it would have reached the same decision" against the plaintiffs "even

in the absence of the protected conduct." Ibid. The government is welcome here to raise the issue of probable cause to make an arrest as evidence that it would have arrested an individual regardless of her exercising First Amendment protected rights. But the existence of probable cause here under a *Mt. Healthy* analysis is not outcome determinative or case killing.

The *Mt. Healthy* standard appropriately balances the interests in retaliatory arrest cases. It initially imposes burdens on the plaintiff. Only if the plaintiff satisfies those hurdles does the burden eventually shift to the government.

Furthermore, imposing any greater burden on plaintiffs is counterintuitive, given that the actions of the government respondent in this case involve viewpoint-based discrimination targeting political expression and speech about matters of public concern. Statutes targeting political speech are content based and thus are subject to the rigorous strict scrutiny standard of judicial review. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). Viewpoint-based statutes – a subset of content-based statutes – are even more reprehensible. *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) ("A law found to discriminate based on viewpoint is an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'") (Kennedy, J., concurring) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995)). To ratchet up the burden on

plaintiffs in First Amendment retaliatory arrest cases like this via a probable cause hurdle thus contradicts the intensive, searching scrutiny to which government actions like those engaged in here would be subjected if they took the form of statutes. In other words, given this Court's special concerns with protecting political speech and its longstanding doctrinal stance against both content-based laws and viewpoint censorship, adding an additional hurdle to plaintiffs' burdens beyond the *Mt. Healthy* test would be anomalous.

Finally, the *Mt. Healthy* framework substantially tracks the formula deployed by most state statutes designed to counteract the chilling effect of strategic lawsuits against public participation (SLAPPs). At bottom, a retaliatory arrest based on the exercise of the First Amendment rights of free speech or petition is tantamount to a criminal, rather than civil, SLAPP suit. Its purpose is to squelch criticism on issues of public concern. With a SLAPP suit, "[c]itizen-activists lose because they become disenfranchised from the democratic process by lawsuits." Robert D. Richards, *Freedom's Voice: The Perilous Present and Uncertain Future of the First Amendment* 26 (1998). Indeed, just as the endgame of a SLAPP is to stifle First Amendment rights, in a "claim for retaliatory arrest, the injury occurs not because of the arrest itself, but by the suppression of a constitutionally guaranteed right through means of an arrest." Randolph A. Robinson II, *Policing the Police: Protecting Civil Remedies in Cases of Retaliatory Arrest*, 89 Denv. L. Rev. 499, 514 (2012).

For instance, California's anti-SLAPP statute allows the victim of a SLAPP to make a speedy motion to strike a complaint if, initially, the victim can

demonstrate that she was exercising the "right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." Cal. Code Civ. Proc. § 425.16 (b) (1) (2017). If the target of a SLAPP satisfies this hurdle, then the burden shifts to the plaintiff – the SLAPPer, as it were – to establish "there is a probability" that it will prevail on the underlying claim. Ibid. This burden shifting is consistent with that embraced in the *Mt. Healthy* test for retaliatory First Amendment claims.

CONCLUSION

For all of these reasons, which strike at the heart of the First Amendment rights of speech, petition and press, and which affect core political expression and speech about matters of public concern engaged in by citizen-critics of government, amici curiae respectfully request that this Court hold that *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) supplies the appropriate framework for analyzing First Amendment retaliatory-arrest claims and that the existence of probable cause does not defeat a First Amendment retaliatory-arrest claim as a matter of law.

Respectfully submitted.

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No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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City of Chicago, Ill., *Civilian Office of Police Accountability*, http://www.chicagocopa.org (last visited Jan. 25, 2018) 15

City of St. Louis, Mo., How To File a Complaint Against a St Louis Metropolitan Police Officer, *Civilian Oversight Board, available at* https://goo.gl/gCeRUF (last visited Jan. 25, 2018) 16

Greg Johnson, *6 dead in shootings at Kirkwood City Hall*, St. Louis Post-Dispatch (Feb. 7, 2008), *available at* https://goo.gl/Dr2UVd 5

Martin Kaste, *Police Struggle To Balance Public Safety With Free Speech During Protests*, National Public Radio (Aug. 26, 2017), *available at* https://goo.gl/An3rUD 6

Matthew Bramlett, *City council meeting draws belligerence, disagreements*, Claremont Courier (Jan. 26, 2017), *available at* https://goo.gl/QsifC8 5

Meghan Keneally, *The History of Violence on Presidential Campaign Trails*, ABC News (Mar. 14, 2016), *available at* https://goo.gl/j91D3e 7

TABLE OF AUTHORITIES—Continued

Page(s)

Rick Neale, *Emotions high at Palm Bay City Council Meeting*, Florida Today (May 5, 2017), *available at* https://goo.gl/PKEEBg 5

Scott Schwebke, *Anti-Trump protesters clash with Santa Ana police, demonstrate at three O.C. campuses*, Orange County Register (Nov. 11, 2016), *available at* https://goo.gl/hr5Vaz 6

Sean Curtis, *4 reasons why police departments are struggling to fill their ranks*, Policeone.com (Oct. 12, 2017), *available at* https://goo.gl/5KLKjx 10

U.S. Dep't of Justice – Civil Rights Division, *Investigation of the Ferguson Police Department* (Mar. 4, 2005), *available at* https://goo.gl/bMmpT3 17

INTEREST OF THE AMICI CURIAE[1]

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

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[1] The parties have consented to the filing of this brief. Petitioner has filed a blanket consent to the filing of amicus briefs in this case. Counsel of record for all parties received notice at least 10 days prior to the due date of amici curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and State supreme and appellate courts.

Amici curiae are national organizations representing elected and appointed officials of state and local governments. Members of these organizations employ law enforcement officers who keep the peace and protect public order and safety. State and local law enforcement officers frequently encounter situations similar to the one at issue in this case.

SUMMARY OF THE ARGUMENT

The Court should hold that pleading and proving the absence of probable cause is a required element of all First Amendment retaliatory-arrest claims. Adopting Fane Lozman's contrary rule will have significant negative effects on state and local governments. It will make it more difficult to maintain order and safety at local-government meetings, public protests and demonstrations, and political rallies. Also, because alleging municipal liability is a fairly easy thing to do, local governments, in addition to their officers, will face an increased likelihood of defending against meritless lawsuits based on lawful arrests. Courts will be less able to weed such claims out early in the case. Lastly, because Lozman's proposed rule will lead to more lawsuits (as virtually *anyone* will be

able to manufacture a claim simply by speaking before an arrest), the rule will make recruiting and retaining police officers more difficult.

Additional protections from retaliatory arrests exist besides the First Amendment. The 50 State constitutions offer meaningful protections against the abridgment of the freedom of speech. Nothing prevents plaintiffs from pressing their rights under these State constitutions. State courts can choose to adopt a greater degree of protection to guard against retaliatory arrests.

In addition to the State constitutions, internal disciplinary measures within state and local police departments offer meaningful remedies for true victims of retaliation at the hands of untrained (or untrainable, problem) officers. These measures can lead to systemic change.

ARGUMENT

Amici fully support Respondent's persuasive argument that the existence of probable cause should defeat a retaliatory-arrest claim as a matter of law. Respondent's proposed rule is consistent with the constitutional principles at stake, closely tracks general tort principles, accommodates the distinctive features of retaliatory-arrest claims, and is consonant with First Amendment values. Moreover, a no-probable-cause rule gives law enforcement clear guidance in the field, something this Court prefers when crafting constitutional rules to govern police conduct. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). This rule also will better weed out frivolous retaliatory-arrest claims early on—or better yet, dissuade plaintiffs from asserting meritless claims at all. The Court should embrace it.

I. Adopting Lozman's formulation for retaliatory-arrest claims will hinder the operations of state and local governments.

Adopting Lozman's contrary rule will significantly affect the ability of state and local law enforcement to perform their protective functions. Law enforcement officers face unfamiliar and potentially life-threatening situations every day. Similar to the decision whether to use force when making an arrest, the decision to make an arrest in the first place—determining whether probable cause exists—is made "not in the courtroom but at the scene," often in a "split second." *Wong Sun v. United States*, 371 U.S. 471, 499 (1963) (Clark, J., dissenting). An officer must respond to a situation he or she encounters then and there, without the luxury of consulting an attorney beforehand to determine whether an arrest will later embroil the officer in a lawsuit. Where an officer has probable cause, the decision to arrest is not one this Court should force an officer to second-guess on pain of personal liability simply because a judge or jury, years later, may see the situation differently. The stakes are too high to impose such a burden on officers.

A. Lozman's proposed rule will make it more difficult to maintain safety and order at local-government meetings, public protests, and political rallies.

A city council meeting is one of the best places to observe vigorous exercise of the right of free speech. This Court "has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). That is especially true

when the public issue pertains to "the stewardship of public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274–75 (1964). Almost nowhere else is the exercise of that "fundamental" right, *id.*, more on display than at local-government meetings, where the public is invited to address members of local government directly.

For better or worse, however, emotions can run high at public meetings. *See* Rick Neale, *Emotions high at Palm Bay City Council Meeting*, Florida Today (May 5, 2017).[2] *See also* Matthew Bramlett, *City council meeting draws belligerence, disagreements*, Claremont Courier (Jan. 26, 2017).[3] Emotions can lead to chaos and violence in some cases. *See* Chris Suarez, *Three arrested as councilors vote to shroud Confederate statues at meeting overwhelmed by anger*, The Daily Progress (Aug. 22, 2017).[4] And at times these strong emotions can lead to tragedy. *See* Greg Johnson, *6 dead in shootings at Kirkwood City Hall*, St. Louis Post-Dispatch (Feb. 7, 2008).[5] Maintaining order at these meetings can unintentionally abridge speech, as where a citizen must be removed because he or she is causing a disturbance.

Protests and demonstrations present similar difficulties for law enforcement. Like speech at local-government meetings, protests almost always target public issues and nearly everything a participant says

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[2] Available at https://goo.gl/PKEEBg.

[3] Available at https://goo.gl/QsifC8.

[4] Available at https://goo.gl/3eVTQg.

[5] Available at https://goo.gl/Dr2UVd.

will qualify as protected speech. The chaos that unfolded in Charlottesville, Virginia just last year is a painful reminder that emotions at demonstrations can lead to violence and death, at times with little or no warning. *See also* Scott Schwebke, *Anti-Trump protesters clash with Santa Ana police, demonstrate at three O.C. campuses*, Orange County Register (Nov. 11, 2016).[6] Police already struggle at times to strike an appropriate balance between liberty and safety, even without the prospect of a lawsuit. *See* Martin Kaste, *Police Struggle To Balance Public Safety With Free Speech During Protests*, National Public Radio (Aug. 26, 2017).[7] To protect the right of peaceful protesters to speak, it is imperative that trained law enforcement be permitted the breathing space to perform their duties without fear of a lawsuit if they decide to arrest when they have probable cause to do so. *See Reichle v. Howards*, 566 U.S. 658, 668 (2011).

Political rallies pose perhaps the greatest difficulties for law enforcement. Free-speech rights reach their zenith at rallies because the speech involves matters of public concern, in particular "the stewardship of public officials." *N.Y. Times*, 376 U.S. at 274–75; *see Connick*, 461 U.S. at 145; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 429 (1992) (noting that "First Amendment protection is at its zenith" when government regulates "political speech or the expression of editorial opinion on matters of public importance" (cleaned up)). Officers at such rallies are exposed to high concentrations of core political speech, as people feel free to speak their minds and are encouraged to do so. Yet rallies can also pose serious safety concerns

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[6] Available at https://goo.gl/hr5Vaz.

[7] Available at https://goo.gl/An3rUD.

because of the emotions they can stir. *See* Meghan Keneally, *The History of Violence on Presidential Campaign Trails*, ABC News (Mar. 14, 2016).[8]

An officer who, based on instinct, training, and (most importantly) probable cause, decides it is appropriate to arrest someone should not face personal liability for that decision simply because the arrestee thinks he or she was arrested for his or her speech. Lozman's proposed rule may cause officers to second-guess themselves in tense and rapidly evolving situations arising at these and other public venues. Under Lozman's proposal, officers would have to stop to ask themselves whether they truly are making an arrest based on a concern that a crime has been or is about to be committed, or instead whether their personal views of the arrestee's speech are motivating the decision in some way. It may be difficult for a court or jury, given time for reflection and deliberation after hearing all of the evidence at a trial, to sort out what motivated the officer's decision. How much more difficult will it be for the officer to sort that out in the moment they decide to arrest someone? *See New York v. Quarles*, 467 U.S. 649, 656 (1984) (noting the "kaleidoscopic situation[s]" officers face, where "spontaneity" is "necessarily the order of the day" and officers must respond "out of a host of different, instinctive, and largely unverifiable motives"). And even if the speech is not personally motivating the officer's arresting decision, given the arrest's temporal proximity to the speech, it is easy for an arrestee *to perceive* the speech as motivating the arrest. Officers may have difficulty rebutting the inference that speech caused the arrest.

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[8] Available at https://goo.gl/j91D3e.

B. Alleging *Monell* liability is easy to do, and *Twombly* and *Iqbal* offer inadequate protection from frivolous lawsuits.

Adopting Lozman's rule will make it easier to state frivolous claims not only against officers for retaliatory arrest but against local governments as well, based on those arrests. That is because *Monell* claims, generally speaking, are relatively simple to state, even under the pleading requirements of *Iqbal* and *Twombly*.

"Plaintiffs who seek to impose liability on local governments under § 1983 must prove that 'action pursuant to official municipal policy' caused their injury." *Connick v. Thompson*, 563 U.S. 51, 60–61 (2011). An "official municipal policy" can be made through "the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Id.* at 61.

If a claim against the officer survives a Rule 12(b)(6) motion, chances are high that a *Monell* claim against the officer's employer will as well, given the relative ease in asserting one. Consider, for example, the allegations in *Owens v. Baltimore City State's Attorney's Office*, 767 F.3d 379 (4th Cir. 2014), which the Fourth Circuit said were enough for the *Monell* claim to proceed. James Owens sued a number of city officers for withholding *Brady* material. He also asserted a § 1983 claim against the Baltimore City Police Department. The district court found the allegations against the police department wanting. The Fourth Circuit disagreed and reinstated the claim. It began by contrasting the difficulty in prevailing on a *Monell* claim, which "is no easy task," with "simply alleging such a claim," which is "easier." *Id.* at 402–03. To that

end, the court found that Owens had sufficiently pleaded that the police department "maintained a custom, policy, and/or practice" of condoning its officers' conduct in knowingly, consciously, and repeatedly withholding and suppressing exculpatory evidence, because Owens had alleged the existence of (1) "[r]eported and unreported cases" of *Brady* violations, and (2) "a number of motions [that] were filed and granted" around the same time. *Id.* at 403.

Other recent decisions from the federal courts of appeals further show the ease with which a plaintiff can sue a local government under § 1983. *See, e.g.*, *Hoefling v. City of Miami*, 811 F.3d 1271, 1280–81 (11th Cir. 2016) (reversing dismissal of *Monell* claim, pointing to allegation that others apparently received similar treatment by city "as a result of the City['s] and [the marine patrol officers'] failure to adhere to law and appropriate procedures regarding the investigation and destruction of potentially derelict vessels"); *Haley v. City of Boston*, 657 F.3d 39, 53 (1st Cir. 2011) (reversing dismissal in view of "wholly unexplained" nature of city police officers' suppression of evidence and the alleged (but not identified) "volume of cases" involving similar violations in the Boston Police Department).

These cases illustrate that surviving a local government's motion to dismiss in this context requires a plaintiff simply to allege that others have been arrested by officers in the same department in retaliation for exercising their freedom of speech. Especially because Lozman's proposal would create a regime in which legitimate arrests nearly always can be dressed up as retaliatory ones, pleading the existence of other such arrests will be "easy." *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 175 (2004).

C. Frivolous claims for retaliatory arrest impose reputational harms, which make recruiting and retaining police officers more difficult.

Beyond the direct financial costs they create (*e.g.*, attorney's fees, lost employee productivity due to depositions and other case preparations), frivolous § 1983 lawsuits impose significant reputational harms—on both the officer and the city. It bears repeating: allegations of government misconduct are easy to allege and hard to disprove. Adopting Lozman's rule will only increase the harm these lawsuits bring, as they will become easier to assert and no less difficult to disprove. And because motivation and causation are questions of fact, the cases will have to be tried if not settled, instead of being resolved by motion practice. Regardless whether the officers and local governments ultimately win, the publicity of the litigation is likely to unfairly erode confidence in law enforcement.

The prospect of facing personal liability for actions taken in the line of duty also contributes to police departments' struggle to fill and maintain their ranks. *See* Sean Curtis, *4 reasons why police departments are struggling to fill their ranks*, Policeone.com (Oct. 12, 2017).[9] By making it easier to sue officers for their arrests, Lozman's proposed rule threatens to amplify these recruitment and retention problems.

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[9] Available at https://goo.gl/5KLKjx.

II. State and local governments respect the importance of their citizenry's freedom of speech and afford meaningful protections against its infringement.

A. The First Amendment is not the sole bulwark against retaliatory arrests; the 50 State Constitutions also protect the right of citizens to speak freely without the threat of retaliation.

Many may forget that the U.S. Constitution is not alone in protecting the freedom of speech—State constitutions protect as well. All 50 State constitutions include provisions that protect against speech abridgment.[10] Although there is diversity in the way States formulate this protection, all provide rich safeguards nonetheless.[11]

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[10] *See* Ala. Const. art. 1, § 4; Alaska Const. art. I, § 5; Ariz. Const. art. 2, § 6; Ark. Const. art. 2, § 6; Cal. Const. art. 1, § 2(a); Colo. Const. art. II, § 10; Conn. Const. art. I, § 4; Del. Const. art. I, § 5; Fla. Const. art. I, § 4; Ga. Const. art. I, § 1, ¶ 5; Haw. Const. art. I, § 4; Idaho Const. art. I, § 9; Ill. Const. art. I, § 4; Ind. Const. art. 1, § 9; Iowa Const. art. I, § 7; Kan. Const. Bill of Rights § 11; Ky. Const. § 8; La. Const. art. I, § 7; Me. Const. art. I, § 4; Md. Const. Declaration of Rights, art. 10; Mass. Const. Pt. 1, art. XXI; Mo. Const. art. I, § 8; Mont. Const. art. II, § 7; Neb. Const. art. I-5; Nev. Const. art. 1, § 9; N.H. Const. Pt. I, art. 22; N.J. Const. art. I, § 6; N.M. Const. art. II, § 17; N.Y. Const. art. I, § 8; N.C. Const. art. I, § 14; N.D. Const. art. I, § 4; Ohio Const. art. I, § 11; Okla. Const. § II-22; Or. Const. art. I, § 8; Pa. Const. art. I, § 7; R.I. Const. art. I, § 21; S.C. Const. art. I, § 2; S.D. Const. art. VI, § 5; Tenn. Const. art. 1, § 19; Tex. Const. art. I, § 8; Utah Const. art. I, § 15; Vt. Const. ch. I, art. 13; Va. Const. art. I, § 12; Wash. Const. art. I, § 5; W. Va. Const. art. III, § 7; Wis. Const. art. I, § 3; Wyo. Const. art. I, § 20.

[11] *Compare, e.g.*, Cal. Const. art. 1, § 2(a) ("Every person may freely speak, write and publish his or her sentiments on all

This Court has long acknowledged that its interpretation of the First (and Fourteenth) Amendments does not limit "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980); *see also Kelo v. City of New London*, 545 U.S. 469, 489 (2005) (saying same thing with respect to Fifth Amendment Takings Clause); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (same for Fifth Amendment protection against self-incrimination).

Some States have taken the Court's statements to heart, construing their constitutions to protect more speech than the First Amendment does. *See, e.g.*, *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 773 P.2d 455, 459 (Ariz. 1989) ("Indeed, this court has previously given art. 2, § 6 [of the Arizona

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subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."); Me. Const. art. I, § 4 ("Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty."); N.H. Const. Pt. I, art. 22 ("Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved."); Or. Const. art. I, § 8 ("No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."); R.I. Const. art. I, § 21 ("No law abridging the freedom of speech shall be enacted."); Va. Const. art. I, § 12 ("That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press.").

Constitution] greater scope than the first amendment."); *People ex rel. Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492, 557–58 (N.Y. 1986) ("[T]he minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression."); *Beach v. Shanley*, 465 N.E.2d 304, 312 (N.Y. 1984) ("The fact that the Supreme Court has held the First Amendment applicable to the States does not eliminate the right or the need of this State to provide a distinct guarantee of freedom of the press under the State Constitution.").

Going further, some States have even construed their constitutions to protect against abridgment of speech by private actors. For example, the New Jersey Supreme Court has held that the New Jersey Constitution's free-speech clause is "available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms." *State v. Schmid*, 423 A.2d 615, 628 (N.J. 1980) (reversing on state constitutional grounds a trespass conviction for distributing political literature at Princeton without permission); *see Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 103 A.3d 249, 251 (N.J. 2014) (sustaining on state-law grounds a challenge to private high-rise cooperative apartment building's "home rule" barring soliciting and distributing written materials in the building).

The California Supreme Court has similarly construed California's constitution, by holding that a privately owned shopping mall is a public forum where visitors can exercise their freedom of speech the same way they would be entitled to do on a public sidewalk.

Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); *see Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742 (Cal. 2007) (holding that the right to free speech embodied in the California Constitution even includes the right to urge customers in a private shopping mall to boycott one of its stores).

Other States have said likewise. *See, e.g., Bock v. Westminster Mall Co.*, 819 P.2d 55, 56 (Colo. 1991) ("Within the public spaces of the Mall, Article II, Section 10 [of the Colorado Constitution] protects petitioners' rights to distribute political pamphlets and to solicit signatures pledging non-violent dissent from the federal government's foreign policy toward Central America."). And still some have reserved the question whether their constitutions' free-speech guarantees extend protection against private action. *See Roman v. Trustees of Tufts Coll.*, 964 N.E.2d 331, 338 (Mass. 2012).

Adopting Respondent's rule as a federal matter will not prevent state courts from interpreting their constitutions to offer a greater degree of protection than the federal Constitution provides, regardless of the significant downsides of doing so, as described in Respondent's merits brief and this brief.

B. Internal disciplinary measures supply additional protection against retaliatory arrests.

In addition to bringing a claim under state law, a person who believes he or she was arrested in retaliation for exercising the freedom of speech has another effective remedy, one less costly to public safety and order than suing the officer for damages. He or she can pursue a complaint with the police

department's disciplinary or internal affairs unit. If an investigation finds that the complaint has merit, the officer will be disciplined. If more than a few complaints are sustained, it could lead to more vigorous department-wide training or even systemic change in policing practices, where needed.

State and local law enforcement officers must comply with federal and state laws, local ordinances, and department rules and regulations or they are subject to discipline. Most police departments—in big and small cities alike—have established procedures for receiving and processing citizen complaints against the police. Some have entire departments dedicated to police oversight and accountability. Chicago, for example, established the Civilian Office of Police Accountability, replacing the Independent Police Review Authority as the civilian oversight agency of the Chicago Police Department. COPA works alongside the Chicago Police Department's Bureau of Internal Affairs and investigates all complaints of improper arrest, among other forms of misconduct. Through that process, COPA seeks to identify and address patterns of police misconduct and makes policy recommendations to improve the Chicago Police Department, thereby reducing incidents of misconduct. COPA's website offers citizens multiple ways to file a complaint, explains the investigative process, and tracks individual investigations and outcomes. *See Civilian Office of Police Accountability*, http://www.chicagocopa.org (last visited Jan. 25, 2018).

The City of St. Louis's Civilian Oversight Board operates in much the same way, "conducting independent, impartial, thorough and timely investigations" into allegations of police misconduct made against the St. Louis City Metropolitan Police Department

officers. COB reviews, analyzes, investigates, and makes independent findings and recommendations on these complaints. Its website offers instructions (and a two-part video) on how to file a complaint, says what to expect during the process, and includes a link to the complaint form itself. *See* How To File a Complaint Against a St Louis Metropolitan Police Officer, *Civilian Oversight Board.*[12]

Some States even require police departments statewide to issue written procedures for citizens to follow for making a complaint, making the process easier. *See* Cal. Penal Code § 832.5(a)(1) ("Each department or agency in this state that employs peace officers shall establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public.").

A complaint that is sustained following an investigation can mar the officer's record; require the officer to receive remedial training; or lead to reassignment, suspension, or, where warranted, termination. These are serious consequences that serve to deter misconduct but that do not also threaten the officer with potential financial ruin.

Complaints also can lead to systemic changes in policing practices. Civilian oversight boards or departmental internal affairs units can track complaints, recognize problem officers or practices, observe trends in policing, and recommend appropriate changes at the policy-making level. In the very rare situation where needed changes are not implemented from within, the U.S. Department of Justice's Civil Rights

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[12] Available at https://goo.gl/gCeRUF.

Division can intervene. *See, e.g.*, United States Department of Justice – Civil Rights Division, *Investigation of the Ferguson Police Department* (Mar. 4, 2005).[13]

CONCLUSION

The Court should hold that probable cause defeats a claim for First Amendment retaliatory arrest as a matter of law and thus affirm the judgment below.

Respectfully submitted,

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[13] Available at https://goo.gl/bMmpT3.

No. 17-21

IN THE
Supreme Court of the United States

FANE LOZMAN,
Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICI CURIAE* OF NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION AND 25 MEDIA AND FREE SPEECH ORGANIZATIONS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the existence of probable cause defeat a First Amendment retaliatory arrest claim as a matter of law?

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Cox v. Louisiana,
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Devenpeck v. Alford,
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First Nat'l Bank of Boston v. Bellotti,
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Garcia v. Montgomery Cty.,
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Garcia v. Montgomery Cty.,
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Glik v. Cunniffe,
655 F.3d 78 (1st Cir. 2011) 4, 17

Gregory v. City of Chi.,
394 U.S. 111 (1969) 20

Grosjean v. American Press Co.,
297 U.S. 233 (1936) 8

Hartman v. Moore,
547 U.S. 250 (2006) 23, 26

Heffernan v. City of Paterson,
136 S. Ct. 1412 (2016) 23

Huminski v. Corsones,
396 F.3d 53 (2d Cir. 2004) 3

Iacobucci v. Boulter,
193 F.3d 14 (1st Cir. 1999) 3

In re King World Prods., Inc.,
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Kolender v. Lawson,
461 U.S. 352 (1983) 19-20

Lacey v. Maricopa Cty.,
693 F.3d 896 (9th Cir. 2012) 9, 10, 11

Lozman v. City of Riviera Beach,
133 S. Ct. 735 (2013) 2

Malley v. Briggs,
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Monell v. Dep't of Soc. Servs.,
436 U.S. 658 (1978) 22

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) ..... *passim*

N.Y. Times Co. v. United States,
403 U.S. 713 (1971) 3

Nebraska Press Ass'n v. Stuart,
427 U.S. 539 (1976) 18

Papachristou v. City of Jacksonville,
405 U.S. 156 (1972) 20

Patterson v. United States,
999 F. Supp. 2d 300 (D.D.C. 2013) 20

Perry v. Sindermann,
408 U.S. 593 (1972) 22, 24

Reichle v. Howards,
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Rossignol v. Voorhaar,
316 F.3d 516 (4th Cir. 2003) 11, 27

Shuttlesworth v. City of Birmingham,
382 U.S. 87 (1965) 3, 19

Smith v. Goguen,
415 U.S. 566 (1974) 20

Thornhill v. Alabama,
310 U.S. 88 (1940) 20

Turner v. Driver,
848 F.3d 678 (5th Cir. 2017) 17

Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,
429 U.S. 252 (1977) 25

Whren v. United States,
517 U.S. 806 (1996) 25

Constitutional Provisions

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. IV 11, 25

Federal Statutes

42 U.S.C. § 1983 ..... 10, 20, 21

Other Authorities

Andrew Metcalf, *Montgomery County Settles First Amendment Lawsuit with Photographer*, BETHESDA MAGAZINE, March 8, 2017, *available at* http://www.bethesdamagazine.com/Bethesda-Beat/2017/Montgomery-County-Settles-First-Amendment-Lawsuit-with-Photographer 15

David Becker, *Detroit Newspaper Photographer Arrested While Covering Police Action*, Petapixel (reprinted from Detroit Free Press), July 16, 2013, *available at* http://bit.ly/2hySmdC 17

Derek Hawkins, *Popular Texas blogger scooped police on a story. They charged her with 2 felonies, searched her phone records*, WASH. POST, Dec. 22, 2017, *available at* https://www.washingtonpost.com/news/morning-mix/wp/2017/ 12/22/popular-texas-blogger-scooped-police-on-a-story-so-they-charged-her-with-2-felonies/?utm_ term=.2d97ded20883 11

Editorial, *The right to record the NYPD*, N.Y. DAILY NEWS, Mar. 26, 2017, *available at* http://www.nydailynews.com/opinion/record-nypd-article-1.3008500 16

Elana Beiser, *Record Number of Journalists Jailed as Turkey, China, Egypt Pay Scant Price for Repression*, December 13, 2017, https://cpj.org/reports/2017/12/journalists-prison-jail-record-number-turkey-china-egypt.php 4

Elizabeth Kolbert, *The Big Sleazy*, THE NEW YORKER, June 12, 2006, *available at* https://www.newyorker.com/magazine/2006/06/12/the-big-sleazy 8

Erin McCann, *Judge Rejects Riot Charge against Amy Goodman of 'Democracy Now' Over Pipeline Protest*, N.Y. TIMES, Oct. 17, 2016, *available at* https://www.nytimes.com/2016/10/18/us/judge-rejects-riot-charge-against-amy-goodman-of-democracy-now-over-pipeline-protest.html 14

Freep Photographer Arrested While Recording An Arrest, CBSLocal.com, July 16, 2013, *available at* http://detroit.cbslocal.com/2013/07/16/freep-photo_grapher-arrested-while-recording-an-arrest/ 16

Howell Raines, *George Wallace, Segregation Symbol, Dies at 79*, N.Y. TIMES, Sept. 14, 1998, http://www.nytimes.com/1998/09/14/us/george-wallace-segregation-symbol-dies-at-79.html 8

Jaclyn Peiser, *Journalist Swept Up in Inauguration Day Arrests Faces Trial*, N.Y. TIMES, Nov. 14, 2017, *available at* https://www.nytimes.com/2017/11/14/business/media/alexei-wood-journalist-trial-inauguration.html 12-13

James T. Hamilton, *Attacks on the Press Have Helped Bring Down a President Before*, WASH. MONTHLY, January 12, 2017, *available at* https://washingtonmonthly.com/2017/01/12/nixon-and-trump-past-as-prologue 7

Joel Simon, *Barack Obama's Press Freedom Legacy*, COLUMBIA JOURNALISM REV., Apr. 3, 2015, *available at* https://www.cjr.org/criticism/barack_obamas_press_freedom_legacy.php 7

Matt Hamilton, *L.A. Times photographer arrested after covering Nancy Reagan funeral motorcade*, L.A. TIMES, Mar. 9, 2016, *available at* http://lat.ms/1QFntAG 17

Matt Stevens, *Charge Dropped Against Reporter Who Questioned Tom Price*, N.Y. TIMES, Sept. 6, 2017, *available at* https://www.nytimes.com/2017/09/06/business/media/tom-price-journalist-arrest.html 14

Max Zahn, *'This is unprecedented': Public colleges limiting journalist access*, COLUMBIA JOURNALISM REV., Dec. 13, 2017, *available at* https://www.cjr.org/analysis/cuny-campus-journalist-crackdown.php 15

Memo Submitted by White House Counsel John Dean to the Ervin Committee, Facts on File, Watergate and the White House, vol. 1, *available at* https://www.colorado. edu/AmStudies/lewis/film/enemies.htm 7

Michael M. Grynbaum, *Trump, in Latest Bout With Media, Conjures Physical Fight With a Foe*, N.Y. TIMES, July 3, 2017 7

Niraj Chokshi, *Ferguson-related charges dropped against Washington Post and Huffington Post reporters*, WASH. POST, May 19, 2016, *available at* https://www.washingtonpost.com/news/post-nation/wp/2016/05/19/ferguson-related-charges-dropped-against-washington-post-and-huffington-post-reporters/?utm_term=.c18183a7914a 13

Sara Rafsky, *At Occupy protests, U.S. journalists arrested, assaulted*, Comm. to Protect Journalists, Nov. 11, 2011, *available at* http://bit.ly/2i2Mblp 13

Shelley Hepworth, *Tracking Trump-Era Assault on Press Norms*, COLUMBIA JOURNALISM REV., May 25, 2017, *available at* https://www.cjr.org/watchdog/tracking-trump-assault-press-freedom-media-attack.php 7

Steve Myers, *News Photographer Arrested on Long Island for Videotaping Police*, POYNTER, Aug. 1, 2011, *available at* http://bit.ly/2i2zBmi 16

Tasneem Raja, *Tracking Journalists Arrested at Occupy Protests*, MOTHER JONES, November 18, 2011, *available at* http://www.motherjones.com/politics/2011/11/tracking-journalists-arrested-occupy-protests 13

Thomas Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9 (1966) 3-4

Tim Perry, *CBS News Journalist relives his arrest at a Chicago Trump event*, CBS News.com, Nov. 14, 2016, *available at* http://cbsn.ws/2i0ihvJ 17

Times Photographer Is Arrested on Assignment, N.Y. TIMES, Aug. 5, 2012, *available at* http://nyti.ms/2hk8W4U 16

Tom Kludt, *Reporter wounded during arrest at event with Virginia GOP candidate Ed Gillespie*, CNN, Nov. 1, 2017, *available at* http://money.cnn.com/2017/11/01/media/shareblue-reporter-mike-stark-arrested-ed-gillespie/index.html 15

Tom Sherwood, *Journalists Handcuffed, Removed from Taxi Commission Meeting*, NBCWashington.com, June 23, 2011, *available at* http://bit.ly/2h9JeLD 16-17

U.S. Press Freedom Tracker, https://pressfreedomtracker.us/arrest-criminal-charge 5, 12

INTERESTS OF *AMICI CURIAE*[1]

Amici, as described in the Appendix, are twenty-six of the nation's leading news organizations and press advocacy groups, including The National Press Photographers Association ("NPPA"), The Reporters Committee for Freedom of the Press, and The Media Law Resource Center, Inc. ("MLRC").

The membership of NPPA, the nation's leading professional organization for photojournalists, includes photographers, members of the press generally and citizen journalists, on whose behalf the NPPA advocates in disputes involving interference with First Amendment rights to report on news and matters of public interest. The Reporters Committee for Freedom of the Press, a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media, has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The MLRC, a professional association founded in 1980 for content providers in all media and their defense lawyers, provides a wide range of resources on media and content law, as well as policy issues, including news and analysis of legal, legislative and regulatory developments; litigation

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[1] All parties have consented to this *amici curiae* brief. Petitioner has filed his consent with the Clerk, and Respondent consented directly to the undersigned counsel for *Amici*. No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

resources and practice guides; and national and international media law conferences and meetings.

The interest in this case of the NPPA, Reporters Committee and MLRC, and other undersigned *Amici* is to ensure that the crucial role that journalists, members of the press, and citizen reporters play in promoting discussion of matters of public concern is not diminished. The question presented in this case is of particular importance to the press, whose institutional role is to serve as a critic and check on government. If probable cause bars all claims for retaliatory arrests, the government will be given a powerful weapon that can be used to chill and intimidate journalists.

STATEMENT

Petitioner Fane Lozman is an outspoken critic of the City of Riviera Beach, Florida. His disputes with the City Council, particularly over the use of the power of eminent domain, have spanned over a decade and already have resulted in one trip to this Court. *Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013). This case arose from Lozman's attempt to address the City Council at an open meeting in 2006. He sought to speak on the subject of government corruption, but after just a few seconds the presiding councilmember attempted to silence him. Lozman continued talking, however, and was promptly arrested, ostensibly on charges of "disorderly conduct" and "resisting arrest without violence." Pet. App. 4a. This case squarely presents the issue of whether the existence of probable cause defeats a First Amendment retaliation claim as a matter of law.

It is not uncommon for gadflies like Lozman to arouse the ire of those they criticize and to face threats of arrest as a result. *See, e.g., Huminski v. Corsones*, 396 F.3d 53 (2d Cir. 2004); *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999). Such cases raise important First Amendment questions, for as this Court has observed, "[t]he freedom of individuals verbally to oppose or challenge [the government] without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987). *See also Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91 (1965) (disobeying a police command to move along cannot justify arrest; such a requirement would constitute "ever-present potential for arbitrarily suppressing First Amendment liberties," the "hallmark of a police state").

These issues are of vital importance to members of the press, whose institutional role is to serve as a check on government. As Justice Black wrote, the Framers of the Constitution "gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government." *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). When the press performs this vital role, "'the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) (quoting Thomas Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9

(1966)). Given this dynamic, the threat of retaliatory arrests without constitutional recourse is particularly chilling, because "law enforcement officials ... are granted substantial discretion that may be misused to deprive individuals of their liberties." *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

Such concerns are vividly illustrated by the record of countries whose journalists lack the shield of the First Amendment. According to the Committee to Protect Journalists, 262 reporters and editors around the world were jailed in 2017 because of their work. Elana Beiser, *Record Number of Journalists Jailed as Turkey, China, Egypt Pay Scant Price for Repression*, December 13, 2017, https://cpj.org/reports/2017/12/journalists-prison-jail-record-number-turkey-china-egypt.php. This set a new record, outpacing 2016 when 259 journalists were arrested. Nearly three quarters of those detained were held on charges of being "anti-state" under various vague laws. *Id.*

What distinguishes the United States from these repressive regimes is our legacy of constitutional protections, especially the guarantees provided by the First Amendment. If the Constitution fails to provide sufficient breathing space from the threat of arbitrary arrests, then the freedoms of speech and press will be eviscerated. The decision in this case will have ramifications that extend far beyond the local politics of Riviera Beach, Florida.

SUMMARY OF ARGUMENT

This case arises from the arrest of a lone government critic, but the question to be decided has far-

reaching implications for freedom of the press. If the mere existence of probable cause to make an arrest for any offense can preclude constitutional claims alleging First Amendment retaliation, the government gains a powerful tool for suppressing critical news coverage.

In the United States, numerous journalists have been subjected to arrest merely for doing their jobs. Although it is rare, newspaper publishers have been rousted from their homes in the middle of the night for exposing government corruption. More frequently, reporters and photographers have been swept up by police as they try to cover public demonstrations or to document various forms of police action. According to the U.S. Press Freedom Tracker, in 2017 alone, 32 journalists were arrested while trying to document or report the news, *see U.S. Press Freedom Tracker*, https://pressfreedomtracker.us/arrest-criminal-charge, and in the past several years, many more have been arrested covering such events as unrest during the presidential inauguration, the Occupy Wall Street demonstrations, confrontations in Ferguson, Missouri, and the Black Lives Matter movement.

Where arrests are motivated by hostility to the press or out of a desire to control news coverage, a mere probable cause requirement is not sufficient to safeguard the vital First Amendment values at stake. Generalized laws aimed at preserving public order—such as disorderly conduct or disturbing the peace—give police virtually uncabined discretion in deciding who should be arrested and who may be allowed to report without interference. This Court

has held on numerous occasions that such discretion can be misused and First Amendment protections undermined, particularly where press coverage is unwelcome to those in authority.

The Court should hold that a finding of probable cause does not bar claims alleging First Amendment retaliation, and should adopt a standard that appropriately accommodates the needs of law enforcement without encroaching on constitutional protections for free speech and press. Such a test was articulated in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), where, once a plaintiff has shown a censorial motive, the burden shifts to the government to show it would have taken the same action regardless. Such an approach preserves police officers' ability to raise probable cause as a defense, but it does not extinguish First Amendment claims when government actors purposefully target members of the press.

ARGUMENT

I. FREEDOM OF THE PRESS IS AT RISK IF PROBABLE CAUSE SERVES AS AN ABSOLUTE BAR TO FIRST AMENDMENT RETALIATION CLAIMS

Because the very purpose of a free press is to act as an adversary to unchecked governmental power, it is commonplace for those who exercise that power to take offense. The current occupant of the White House has branded the press as the "enemy of the American people," and re-tweeted videos of himself wrestling an anthropomorphized news network to

the ground.[2] Such hostility to the press is hardly new, nor is it confined to any political party or level of government. The Obama Administration prosecuted more people for leaks to the press than all previous presidential administrations combined;[3] Nixon had his "Enemies List"[4] and approved direct and indirect assaults on press freedom;[5] Governor George Wallace of Alabama regularly castigated

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[2] *See, e.g.*, Shelley Hepworth, *Tracking Trump-Era Assault on Press Norms*, COLUMBIA JOURNALISM REV., May 25, 2017, https://www.cjr.org/watchdog/tracking-trump-assault-press-freedom-media-attack.php; Michael M. Grynbaum, *Trump, in Latest Bout With Media, Conjures Physical Fight With a Foe*, N.Y. TIMES, July 3, 2017, at A10.

[3] Joel Simon, *Barack Obama's Press Freedom Legacy*, COLUMBIA JOURNALISM REV., Apr. 3, 2015, https://www.cjr.org/criticism/barack_obamas_press_freedom_legacy.php ("[T]he Obama administration has prosecuted more leakers under the 1917 Espionage Act than all former presidents combined.").

[4] List of White House 'Enemies' and Memo Submitted by White House Counsel John Dean to the Ervin Committee, Facts on File, Watergate and the White House, vol. 1, pp. 96-97, https://www.colorado.edu/AmStudies/lewis/film/enemies.htm (list included political enemies as well as more than 50 newspaper and TV reporters).

[5] James T. Hamilton, *Attacks on the Press Have Helped Bring Down a President Before*, WASH. MONTHLY, January 12, 2017, https://washingtonmonthly.com/2017/01/12/nixon-and-trump-past-as-prologue (Nixon "approved illegal wiretaps to listen into the phone conversations of journalists critical of the administration. His Justice Department lodged antitrust charges against the three broadcast networks. He asked FBI Director J. Edgar Hoover to develop 'a run down on the homosexuals known and suspected in the Washington Press Corps.'").

journalists;[6] and Louisiana Governor Huey Long tried to impose a special tax on urban newspapers that he called a "tax on lying."[7]

The contentious relationship between government and the press occurs naturally and exists by design. However, it presents a constitutional problem if the government has at its disposal legal tools that can facilitate acts of retaliation. In particular, news gathering can be disrupted where arrests can be used as a "catch and release" technique, and the press can be intimidated into silence even if there is no prosecution. Such concerns arise in a variety of circumstances.

A. Retaliation for Unfavorable Press Coverage

In this country, it is rare for a public official to arrest a journalist for publishing a critical story—

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[6] Howell Raines, *George Wallace, Segregation Symbol, Dies at 79*, N.Y. TIMES, Sept. 14, 1998, http://www.nytimes.com/1998/09/14/us/george-wallace-segregation-symbol-dies-at-79.html (Wallace's "expurgated list of demons" included "liberals, Communists, the Eastern press, Federal judges, [and] 'pointy-headed intellectuals.'").

[7] Elizabeth Kolbert, *The Big Sleazy*, THE NEW YORKER, June 12, 2006, https://www.newyorker.com/magazine/2006/06/12/the-big-sleazy ("Long proposed (and, of course, got passed) a tax on advertising sales by newspapers with a circulation exceeding twenty thousand. The tax affected primarily the large dailies in New Orleans, which had always opposed him."); *see Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("[T]his is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.").

this is not Russia or Turkey—but it does happen. Sheriff Joe Arpaio of Arizona arrested the publishers of *Phoenix New Times* for publishing articles that probed the sheriff's commercial real estate holdings and that exposed his abusive investigation of the newspaper. *Lacey v. Maricopa Cty.*, 693 F.3d 896, 907-09 (9th Cir. 2012). As the Ninth Circuit observed, "[i]t is hard to conceive of a more direct assault on the First Amendment than public officials ordering the immediate arrests of their critics." *Id.* at 917.

The arrests in that case were rationalized in part on the ground that the publishers of *New Times* had allegedly violated an Arizona statute that prohibits publication of personal information about a public official if such disclosure "pose[s] an imminent and serious threat" to the official's safety. But in a memo Sheriff Arpaio's Director of Legal Affairs made clear the real reason why *New Times* had been singled out despite publication of the same information on other websites: "[N]one of these other web cites [sic] are or have ever been historically anti-Arpaio." By contrast *New Times* "resorted to writing articles against the Sheriff, using language that is inflammatory, insulting, vituperative, and the like." *Id.* at 908.

The County also commenced an investigation of *New Times*, demanding, among other things, information on confidential sources, reporters' and editors' notebooks, memoranda, and other documents for any story critical of Arpaio. *Id.* at 909. After *New Times* ran a story revealing these demands, Arpaio's "Selective Enforcement Unit" staged a

nighttime raid and arrested the publishers in their homes. *Id.* at 910.

The publishers brought a civil rights claim pursuant to 42 U.S.C. § 1983 and the Ninth Circuit denied the defendants' qualified immunity defense. The court did not address the issue raised in this case, whether a probable cause finding would have barred bringing any First Amendment retaliation claims. *Id.* at 917 n.8. Ultimately, it found the arrests were not supported by probable cause. *Id.* at 919. However, if probable cause had existed to make an arrest, then First Amendment retaliation claims arguably would have been entirely barred even on these egregious facts.[8] In any event, it was a close case. The court suggested that the publishers' claims might have been precluded against the sheriff if the county attorney had "merely communicated that the statute had been violated, or represented that the subpoenas were valid." *Id.* at 923.

Although rare, this is not an isolated case. Just this month, a blogger in Texas was arrested on the felony charge of "misuse of official information" after she posted information about the suicide of a U.S. Customs and Border Protection employee in advance of its official release to the news media. The popular blogger regularly covers local law enforcement

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[8] Arizona law prohibits unauthorized disclosure of matters relating to a grand jury proceeding, and *New Times* had published the substance of the subpoenas sent as part of Arpaio's retaliatory investigation. However, the court held probable cause was lacking because subpoenas had not been validly issued pursuant to a grand jury proceeding. *Lacey*, 693 F.3d at 919. *See id.* at 923-24.

issues, but had a contentious relationship with some on the police force because of her widely-viewed reports from crime scenes.[9] Police may not often go so far as to jail their critics, but they have been known to use various methods to suppress unfavorable news coverage.[10] Ironically, if probable cause were recognized as a bar to retaliation claims, arrests may become a more common tool, as police would have a heightened ability to insulate themselves from liability.

These cases highlight why the requirement for probable cause is not sufficient standing alone, and why the victims of abusive arrests must have an available First Amendment remedy. As the Ninth Circuit suggested in *Lacey*, 693 F.3d at 923, probable cause might have been present had the facts been slightly different, yet the need for legal recourse would have been just as great. In *Reichle v. Howards*, 566 U.S. 658, 668-69 (2012), this Court

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[9] Derek Hawkins, *Popular Texas blogger scooped police on a story. They charged her with 2 felonies, searched her phone records*, WASH. POST, Dec. 22, 2017, *available at* https://www.washingtonpost.com/news/morning-mix/wp/2017/12/22/popular-texas-blogger-scooped-police-on-a-story-so-they-charged-her-with-2-felonies/?utm_ term=.2d97ded20883.

[10] *See, e.g., Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) ("Defendants executed a systematic, carefully-organized plan to suppress the distribution of *St. Mary's Today* ... to retaliate against those who questioned their fitness for public office and [] challenged many of them in the conduct of their official duties."); *Addison v. City of Baker City*, 258 F. Supp. 3d 1207, 1216-20 (D. Ore. 2017) (author of editorial asserting police had violated students' Fourth Amendment rights placed on watch list, subjected to police stops, and had prospective employers cautioned about his stability).

stopped short of finding that probable cause was sufficient to bar First Amendment retaliatory arrest claims for good reason. The Court observed that "in many retaliatory arrest cases, it is the officer bearing the alleged animus who makes the injurious arrest." *Id.* If probable cause were all that were needed to bar a First Amendment claim, given the ease with which it may be asserted to justify an arrest, officials would be able to retaliate against members of the press with impunity.

B. Arrests While Covering Public Protests or Documenting Police Misconduct

The risk of retaliatory arrest is particularly acute for reporters and news photographers covering public protests or recording police activity. As documented by the U.S. Press Freedom Tracker, so far in 2017, at least 32 journalists have been arrested while seeking to document or report news. *See U.S. Press Freedom Tracker*, https://pressfreedomtracker.us/arrest-criminal-charge. The examples provided below illustrate that it is not uncommon for police officers to arrest journalists for attempting to gather news from the midst of civil unrest, for persistently asking questions of public officials, or for videotaping police as they perform duties in public.

Large-scale protests have become a defining feature of the last five years in the life of this nation, but dubious arrests have greatly hindered the ability of journalists "on the ground" to provide the public a much-needed window onto scenes of civil unrest. For instance, earlier this year police arrested nine journalists covering the violent protests that attended President Trump's inauguration. *See* Jaclyn Peiser,

Journalist Swept Up in Inauguration Day Arrests Faces Trial, N.Y. TIMES, Nov. 14, 2017, https://www.nytimes.com/2017/11/14/business/media/alexei-wood-journalist-trial-inauguration.html. The journalists were swept up in the chaotic events of that day, and arrested together with more than two hundred protestors. Prosecutors subsequently dropped the charges against seven of the nine journalists.

These kinds of "catch and release" arrests are not unusual. Officers arrested a number of reporters covering Black Lives Matter protests in Ferguson and St. Louis, Missouri, including reporters for, respectively, the *Washington Post* and *Huffington Post*, leading to dropped charges in each case. Niraj Chokshi, *Ferguson-related charges dropped against Washington Post and Huffington Post reporters*, WASH. POST, May 19, 2016, https://www.washingtonpost.com/news/post-nation/wp/2016/05/19/ferguson-related-charges-dropped-against-washington-post-and-huffington-post-reporters/?utm_term=.c18183a7914a.

Between 2011 and 2012, more than 90 journalists were arrested while reporting at Occupy Wall Street protests that occurred around the country. Tasneem Raja, *Tracking Journalists Arrested at Occupy Protests*, MOTHER JONES, November 18, 2011, http://www.motherjones.com/politics/2011/11/tracking-journalists-arrested-occupy-protests; *see also* Sara Rafsky, *At Occupy protests, U.S. journalists arrested, assaulted*, Comm. to Protect Journalists, Nov. 11, 2011, http://bit.ly/2i2Mblp. A North Dakota judge dismissed riot charges for lack of evidence

after a radio journalist was arrested while covering protests against the Dakota Access pipeline. Erin McCann, *Judge Rejects Riot Charge against Amy Goodman of 'Democracy Now' Over Pipeline Protest*, N.Y. TIMES, Oct. 17, 2016, *available at* https://www.nytimes.com/2016/10/18/us/judge-rejects-riot-charge-against-amy-goodman-of-democracy-now-over-pipeline-protest.html. By indiscriminately arresting journalists together with protestors, the police can—and often do—prevent journalists from reporting events occurring at the front lines of public protests, where violent confrontations with police are most likely to occur and where press scrutiny is most needed.

Dubious arrests also have prevented journalists from tenaciously questioning government officials in public places. On May 9, 2017, a reporter was arrested in the West Virginia State Capitol building for shouting questions at the Secretary of the Department of Health and Human Services, Tom Price, as he walked through a public hallway with Counselor to the President, Kellyanne Conway. The reporter was charged with willful disruption of governmental processes, but this charge was dropped after prosecutors determined no crime had been committed. Matt Stevens, *Charge Dropped Against Reporter Who Questioned Tom Price*, N.Y. TIMES, Sept. 6, 2017, *available at* https://www.nytimes.com/2017/09/06/business/media/tom-price-journalist-arrest.html.

In a similar vein, a reporter was violently arrested and injured in November of this year after he refused to stop filming a campaign vehicle used by

Virginia gubernatorial candidate Ed Gillespie, and to stop posing questions to campaign members. Tom Kludt, *Reporter wounded during arrest at event with Virginia GOP candidate Ed Gillespie*, CNN, Nov. 1, 2017, *available at* http://money.cnn.com/2017/11/01/media/shareblue-reporter-mike-stark-arrested-ed-gillespie/index.html. The practice of arresting journalists for asking politicians unwanted questions in public is clearly repugnant to freedoms guaranteed by the First Amendment. Additionally, journalists have been arrested and handcuffed while engaged in newsgathering activities on college campuses, purportedly for "trespassing."[11]

Photojournalists are particularly vulnerable to retaliatory arrests when filming police activity in public. In one instance, a news photographer was acquitted of disorderly conduct after being thrown to the ground and arrested for unobtrusively photographing police officers assisting the issuance of liquor citations to two men. *See* Andrew Metcalf, *Montgomery County Settles First Amendment Lawsuit with Photographer*, BETHESDA MAGAZINE, March 8, 2017, http://www.bethesdamagazine.com/Bethesda-Beat/2017/Montgomery-County-Settles-First-Amendment-Lawsuit-with-Photographer. Similarly, in 2011, a videographer was pulled down from his vantage point and arrested by New York City Police officers after filming police as they cleared Zuccotti Park of demonstrators during Occupy Wall

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[11] Max Zahn, *'This is unprecedented': Public colleges limiting journalist access*, COLUMBIA JOURNALISM REV., Dec. 13, 2017, https://www.cjr.org/analysis/cuny-campus-journalist-crackdown.php.

Street protests. Editorial, *The right to record the NYPD*, N.Y. DAILY NEWS, Mar. 26, 2017, http:// www.nydailynews.com/opinion/record-nypd-article-1.3008500. Disorderly conduct charges against the videographer were later dropped.

In another case, Detroit Police arrested a press photographer after she photographed officers escorting a suspect into a police car and confiscated her phone, although no charges were ever filed. *Freep Photographer Arrested While Recording An Arrest*, CBSLocal.com, July 16, 2013, *available at* http://detroit.cbslocal.com/2013/07/16/freep-photographer-arrested-while-recording-an-arrest/. In yet another instance, a credentialed Long Island news videographer was arrested and charged with obstructing governmental administration for videotaping police activity from a public street in the midst of other bystanders. Steve Myers, *News Photographer Arrested on Long Island for Videotaping Police*, POYNTER, Aug. 1, 2011, http://bit.ly/2i2zBmi (noting that the charge was later dropped). And in August of 2012, a photographer on assignment for *The New York Times* was arrested and charged with obstructing government administration and resisting arrest for photographing the arrest of a teenage girl in the Bronx. *Times Photographer Is Arrested on Assignment*, N.Y. TIMES, Aug. 5, 2012, http://nyti.ms/2hk8W4U.[12]

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[12] Retaliatory arrests are not limited to police officers trying to stop the filming of their own activities. Press photographers and videographers also have been arrested for unwelcome attempts to record public hearings and events. *See, e.g.*, Tom Sherwood, *Journalists Handcuffed, Removed from Taxi*

Arrests such as these thwart the well-established First Amendment right to record police activity in public, which is a crucial function journalists must be able to perform in order to ensure that the police remain accountable to the public they serve.[13] More importantly, police would have a near-foolproof way to clear journalists from crime scenes if this Court were to adopt a rule barring First Amendment retaliation claims so long as officers could conjure some argument for probable cause, either at the time or even long after the fact. This is not an esoteric or hypothetical concern. Such arrests already are common. But if the possibility of constitutional remedies were removed entirely, such arrests would become a standard tool of controlling the press.

Commission Meeting, NBCWashington.com, June 23, 2011, http://bit.ly/2h9JeLD; David Becker, *Detroit Newspaper Photographer Arrested While Covering Police Action*, Petapixel (reprinted from Detroit Free Press), July 16, 2013, http://bit.ly/2hySmdC; Matt Hamilton, *L.A. Times photographer arrested after covering Nancy Reagan funeral motorcade*, L.A. TIMES, Mar. 9, 2016, http://lat.ms/1QFntAG; Tim Perry, *CBS News Journalist relives his arrest at a Chicago Trump event*, CBS News.com, Nov. 14, 2016, http://cbsn.ws/2i0ihvJ.

[13] *E.g.*, *Glik*, 655 F.3d at 82-83 ("Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally."). *See also Turner v. Driver*, 848 F.3d 678, 689 (5th Cir. 2017) ("Filming the police contributes to the public's ability to hold the[m] accountable, ensure that [] officers are not abusing their power, and make informed decisions about police policy."). "Every Circuit Court of Appeals to address this issue (First, Fifth, Seventh, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public" and "we join this growing consensus." *Fields v. City of Philadelphia*, 862 F.3d 353, 355-56 (3d Cir. 2017) (collecting cases).

II. THE COURT SHOULD ADOPT A STANDARD THAT APPROPRIATELY BALANCES THE NEEDS OF LAW ENFORCEMENT WITH FIRST AMENDMENT VALUES

A. The Power to Make Arrests Can Disrupt Newsgathering and Other First Amendment Activities

The power to make arrests is the state's most direct and tangible limit on individual liberty. The impact of its misuse is magnified when employed—as it was in this case—to curtail speech. When it comes to the press, arrests can be used to disrupt the exercise of First Amendment speech and press rights. Any retaliatory arrest immediately halts newsgathering activity and contemporaneous coverage of events. The cost, time commitment, and distraction imposed on journalists and/or their press organizations to address the fallout of arrests also detract from reporting activity.

Such interference with reportage cannot be remedied in full by *post hoc* remedies. *See, e.g., In re King World Prods., Inc.*, 898 F.2d 56, 59 (6th Cir. 1990) ("even minimal interference with first amendment freedoms causes an irreparable injury") (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)). However, the ability to bring civil rights claims can help ameliorate these burdens. It is particularly important that a potential First Amendment remedy be available where the government may attempt to dissuade reporters or photographers from covering events where there exists the possibility of public disorder and clashes between citizens and police.

In such circumstances, the police may be tempted to invoke general laws such as breach of peace (*i.e.*, disorderly conduct), obstructing public ways, failure to comply with a peace officer, or loitering to justify arrests, particularly where there may be unfavorable press coverage. Arrests based on probable cause for violating offenses of such generalized and broad scope can be especially threatening to First Amendment activities as they are "susceptible to abuses of discriminatory application." *E.g.*, *Cox v. Louisiana*, 379 U.S. 536, 551, 554-55 (1965). *See also Shuttlesworth*, 382 U.S. at 93 (such amorphous offenses become "so broad as to evoke constitutional doubts of the utmost gravity").

With the breadth of such laws and the ease of asserting probable cause for their violation, minor offenses can easily be used as a pretext for a speech-halting arrest. As a consequence, the "lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not." *Cox*, 379 U.S. at 557. This creates "a device for the suppression of the communication of ideas and permits the official to act as a censor." *Id.* If the presence of asserted probable cause for such offenses were sufficient to serve as an absolute bar to First Amendment claims, law enforcement would have far too much leeway to curtail protected expression.[14]

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[14] This Court has recognized the need to limit such discretion in numerous cases. *See, e.g.*, *Hill*, 482 U.S. at 465 ("[W]e have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them."); *Kolender v. Lawson*, 461 U.S. 352, 360-

Such concerns are especially applicable in cases like this. In *Garcia v. Montgomery Cty.*, 145 F. Supp. 3d 492 (D. Md. 2015), for example, police arrested a photojournalist for "disturbing the peace" when he photographed police activity on a public street. After he was acquitted of the charges, Garcia filed a Section 1983 claim asserting, among other things, violations of his First Amendment rights. The United States Department of Justice filed a Statement of Interest in support, noting that these kinds of "discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights," such that "courts should view such charges skeptically." Dep't of Justice Statement of Interest, *Garcia v. Montgomery Cty.*, 2013 WL 4539394 (D. Md. Aug. 23, 2013), No. JFM-12-3592, at 1. *See also Patterson v. United States*, 999 F. Supp. 2d 300, 314 (D.D.C. 2013) (citing prevalence of "'contempt of cop' arrests" and "widespread practice of [] officers using [] disorderly conduct law to arrest ... without a legitimate basis").

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61 (1983) (identification requirement unconstitutional because it accords police "full discretion"); *Smith v. Goguen*, 415 U.S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections" thereby "entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'") (quoting *Gregory v. City of Chi.*, 394 U.S. 111, 120 (1969) (Black, J., concurring)); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (vagrancy ordinance "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure'") (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)).

The problem is magnified if the police can try to justify an arrest after-the-fact by asserting they had "arguable probable cause." In this case, for example, midway through Lozman's trial, the state switched theories on what law he supposedly had violated and for which they had probable cause for his arrest. Pet. App. 61a-62a (district court allowed defendants to raise a previously unraised charge). Similarly, in *Garcia*, although the plaintiff had been arrested (and acquitted) on charges of disorderly conduct, in the ensuing civil litigation the police claimed they should not be held to account on the theory that probable cause might have existed to bring other charges.[15] While retaliatory *prosecution* cases have a charging instrument that governs any probable cause inquiry, as *Garcia* illustrates, arresting officers are not similarly limited, *see Garcia*, 145 F. Supp. 3d at 519 (citing *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)), and § 1983 law enforcement defendants are thus free to "move the goalposts" in ensuing civil litigation for retaliatory arrests.

The great latitude officers enjoy to make arrests where they can cite *something*—anything—that serves as probable cause is unduly magnified if legal recourse is blocked by such recitation; this creates the wrong kinds of incentives. Under qualified immunity principles, officers already are immunized from potential liability except where they are plainly incompetent or knowingly violate constitutional

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[15] *Garcia*, 145 F. Supp. 3d at 517-21 (rejecting County's arguments in ensuing civil case that officers had probable cause to arrest for hindering arrest of third parties and/or second degree assault, as lacking objectively reasonable bases).

rights. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). So too, law enforcement agencies cannot be held liable unless an unlawful arrest is pursuant to department custom or policy. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). For cases that clear these hurdles, holding that probable cause to arrest defeats a First Amendment claim further contracts the ability of the press and public to remedy constitutional violations.

This leaves journalists, photographers, citizen reporters and others with even less opportunity to vindicate their rights. It also instructs law enforcement officers that, even if they know they are violating well-settled rights, no liability will attach so long as they can articulate some probable cause for arrest, even after-the-fact. This, in turn, creates disincentives to law enforcement agencies to prevent officers from making constitutionally infirm arrests. Altogether, these factors increase the incidence of arrests that interfere with the exercise of basic First Amendment rights.

B. The Burden Shifting Framework of *Mt. Healthy City School District Board of Education v. Doyle* Strikes the Correct Constitutional Balance

Under standard First Amendment analysis, the government has no legitimate power to retaliate against individuals for engaging in constitutionally protected activity. Public schools may not fire teachers for criticizing administrators, *Perry v. Sindermann*, 408 U.S. 593 (1972); prison officials may not divert prisoners' mail as punishment for speaking to the press, *Crawford-El v. Britton*, 523

U.S. 574 (1998); and agencies may not demote employees for their political affiliations. *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016). Bottom line, official reprisal for protected activity "offends the Constitution," *Crawford-El*, 523 U.S. at 588 n.10, and is subject to recovery, *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

At the same time, the Court has long been sensitive to the potential for retaliation lawsuits to hamstring effective administration of government. Permitting recovery whenever government action is motivated in any part by improper animus risks preventing the government from acting in the public interest. *Mt. Healthy*, 429 U.S. at 285. For example, a school administration might be unable to terminate an underperforming teacher who happens to engage in protected speech with which the administration disagrees. *Id.*

So too has the Court acknowledged the costs of the unique evidentiary burdens that retaliation claims place on public officials. Improper animus is "easy to allege and hard to disprove." *Crawford-El*, 523 U.S. at 585. Retaliation suits therefore may be less amenable to summary disposition and "implicate[] obvious concerns with the social costs of subjecting public officials to discovery and trial, as well as liability for damages." *Id.*

To address these problems, this Court long ago fashioned a burden-shifting framework designed to "protect[] against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Mt. Healthy*, 429 U.S. at 287. Under the *Mt.*

Healthy test, the plaintiff bears the initial burden of demonstrating unconstitutional animus was a motivating factor of an adverse action; the burden then shifts to the defendant to demonstrate that even without the impetus to retaliate the defendant would have taken the action complained of. *Id.*

The *Mt. Healthy* test strikes the appropriate constitutional balance for the vast majority of retaliation claims. In effect, it narrows availability of recovery to cases where unconstitutional animus is the but-for cause of official action and ensures that defendants have an adequate opportunity to defend against frivolous claims at summary judgment. Most importantly, it ensures that an individual "is placed in no worse a position than if he had not engaged in the [protected] conduct." *Id.* at 285-86.

The *Mt. Healthy* test is particularly appropriate in First Amendment retaliatory arrest cases and neatly affords the presence or absence of probable cause due evidentiary weight. No doubt, officers offend the Constitution whenever they arrest an individual in order to inhibit or penalize the exercise of First Amendment freedoms. That is true regardless of whether there exists probable cause, if the arrest would not have occurred but for the protected activity. *Cf. Mt. Healthy*, 429 U.S. at 283-84 (even when a public employee may be discharged for no reason, the government may not discharge the employee because of their protected speech); *Perry*, 408 U.S. at 597 (the government may not deny plaintiff a benefit because of his protected speech, even if it could properly deny it for another reason).

Evidence of the presence or absence of probable cause to arrest will be available to officers in "virtually every retaliatory arrest case," *Reichle*, 566 U.S. at 668, and an officer may raise it as a defense to any claim of retaliation. Its presence may be "fatal" to a plaintiff's ability to prove the requisite but-for causation element of a retaliation claim. *Id.* Under the standard *Mt. Healthy* framework, arrestees, like public employees, are left in no worse a position than if they had not engaged in protected conduct.

In contrast, requiring arrestees to demonstrate an absence of probable cause would decisively tip the scales in favor of defendants, enabling police to indirectly censor and penalize the exercise of First Amendment freedoms in ways the government could not directly command. *See supra* 9-10, 17-23. A rule that probable cause bars a retaliatory arrest claim would immunize these and other government actions that plainly offend the First Amendment.

That probable cause would bar a Fourth Amendment challenge is irrelevant. The Court already has made clear that an arrest which is lawful under the Fourth Amendment may nevertheless violate other constitutional rights. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, this Court acknowledged that the *Mt. Healthy* test governs retaliation claims premised on alleged racial discrimination. 429 U.S. 252, 270 n.21 (1977). And in *Whren v. United States*, it clarified that the Constitution prohibits selective law enforcement based on race, notwithstanding the existence of probable cause. 517 U.S. 806, 813 (1996); *see Reichle*, 566

U.S. at 664 n.5. If the existence of probable cause is no bar to an Equal Protection challenge to an arrest, it should not bar a First Amendment challenge.

Notably, retaliatory arrest claims feature none of the attributes of retaliatory *prosecution* claims that led the Court to impose a no-probable-cause requirement in *Hartman*, 547 U.S. 250. Unlike retaliatory prosecution plaintiffs (and retaliatory arrest defendants), retaliatory arrest plaintiffs do not always have access to a distinct body of highly valuable circumstantial evidence that is available and apt to prove or disprove probable cause, because retaliatory arrest plaintiffs often do not even know the reason for their arrest. *See Devenpeck*, 543 U.S. at 155 (police officers not constitutionally required to state reasons for an arrest). More importantly, in contrast to retaliatory prosecution claims, there is generally no disconnect between animus and injury in retaliatory arrest claims—"it is the officer bearing the alleged animus who makes the injurious arrest." *Reichle*, 566 U.S. at 668-69. Nor is there any presumption of regularity accorded to police officers' arrest decisions that is akin to the presumption of prosecutorial regularity. *Id.*

For these reasons, First Amendment retaliatory arrest claims are best adjudicated under the standard *Mt. Healthy* rubric. That standard preserves police officers' ability to raise probable cause as a defense while ensuring they are not insulated from liability for purposefully abridging and penalizing the exercise of the freedoms guaranteed by the First Amendment.

CONCLUSION

The arrests of reporters and photographers described in this brief "may have taken place in America," but they belong "to a society much different and more oppressive than our own." *Rossignol*, 316 F.3d at 527-28. The Court should adopt a legal standard that makes clear it is "not for law enforcement to summon the organized force of the sheriff's office to the cause of censorship." *Id.* at 528. Toward that end, this Court should reverse the decision below and hold that probable cause does not bar First Amendment claims for retaliatory arrests.

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‡ This brief has been prepared with the assistance of Yale Law School student Catherine Martinez '19.

APPENDIX

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to advancement of visual journalism in its creation, editing and distribution. The NPPA's approximately 6,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the *Voice of Visual Journalists*, vigorously promoting the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The

MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

American Society of News Editors ("ASNE") is an organization with some 500 members, that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Associated Press Media Editors ("APME") is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom

leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The Authors Guild, Inc. was founded in 1912, and is a national non-profit association of more than 9,000 professional, published writers of all genres. The Guild counts historians, biographers, academicians, journalists and other writers of non-fiction and fiction as members. The Guild works to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, and taxation. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business and other areas; they are frequent contributors to the most influential and well-respected publications in every field.

DKT Liberty Project is a nonprofit organization dedicated to promoting individual liberty. Founded in 1997, the Liberty Project is committed to guarding against encroachment by all levels of government and protecting the freedom of all citizens to engage in expression without government interference. DKT Liberty Project has filed numerous briefs supporting free speech rights.

Dow Jones & Company, Inc. is a global provider of news and business information, delivering content to consumers and organizations around the world across multiple formats, including print, digital, mobile and live events. Dow Jones has produced unrivaled quality content for more than 130 years and today has one of the world's largest newsgathering operations globally. It produces leading publications and products including the flagship Wall Street Journal; Factiva; Barron's; MarketWatch; Financial News; Dow Jones Risk & Compliance; Dow Jones Newswires; and Dow Jones VentureSource.

The Electronic Frontier Foundation ("EFF") is a member-supported, nonprofit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has over 37,000 members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology. EFF has filed amicus briefs on many First Amendment issues, including the right to record police. *See Fields v. City of Philadelphia*, No. 16-1650 (3d Cir.).

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media Works, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Freedom of the Press Foundation is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including public advocacy, legal advocacy, the promotion of digital security tools, and crowd-funding.

The Freedom to Read Foundation is an organization established by the American Library Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.

Media Coalition Foundation, Inc. is a non-profit organization, which works to protect the First Amendment and the public's right to access the broadest possible range of information, opinion and entertainment. The Foundation monitors potential threats to freedom of speech and engages in education and litigation to protect free speech rights.

The Media Consortium is a network of the country's leading, progressive, independent media outlets. Our mission is to amplify independent

media's voice, increase our collective clout, leverage our current audience and reach new ones.

MPA – The Association of Magazine Media is the industry association for multi-platform magazine companies. Established in 1919, MPA represents about 100 domestic magazine media companies with close to 1000 national publications that span an enormous range of genres, from nationally known household brands to local and niche enthusiast titles. In addition to domestic magazine media companies, MPA's membership includes international magazine media companies and associate members that support the industry throughout the supply chain. MPA is a non-profit organization representing magazine media, print and digital. MPA provides an organized forum in which publishers can advance their common interests. MPA has a long history of defending free speech and the First Amendment. MPA is the primary advocate and voice for the magazine media industry, driving thought leadership and game-changing strategies to promote the medium's vitality, increase revenues and grow market share. MPA is headquartered in New York City, with a government affairs office in Washington.

New York News Publishers Association ("NYNPA") is the non-profit trade association representing the newspapers of New York State, which have a combined readership of more than five million people. NYNPA is the principal professional association representing New York State's newspaper industry in governmental, regulatory, and other matters.

The New York Press Club is an association of and for working journalists and media professionals. Founded in 1948, its membership includes professionals from all types of news organizations including the Web, television, radio, wire services, daily newspapers, weekly and monthly publications, as well as professionals from the fields of communications, public relations and public affairs.

The New York Press Photographers Association was founded in 1915 and is dedicated to visually documenting the world around us and serving the truth through our images.

The New York State Broadcasters Association, Inc. is a not for profit trade association representing more than 400 radio and television stations throughout the state of New York. Providing news and information to the citizens of New York State is a cornerstone of our public interest obligation to serve our local communities. In order to fulfill this vital role under the First Amendment, The New York State Broadcasters Association, Inc. has a direct interest in ensuring that its members are able to obtain access to information.

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the

Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 150 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN

v.

CITY OF RIVIERA BEACH, FLORIDA

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978) 11
Ford v. City of Yakima, 706 F.3d 1188 (9th Cir. 2013) 19
Lewis v. City of New Orleans, 415 U.S. 130 (1974) 10
Lewis v. City of Tulsa, 775 P.2d 821 (Okla. Crim. App. 1989) 14
NAACP v. Button, 371 U.S. 415 (1963) 10
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 20

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Cal. Penal Code § 407 12
Cal. Penal Code § 408 13
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D.C. Code § 22–1307(a) (2016) 13
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Idaho Code § 18-6404(2017) 13
Idaho Code § 18-6405 (2017) 13
Iowa Code § 723.2 (2017) 13
La. Rev. Stat. § 14:97 (2017) 13
Norfolk, Va. Code of Ordinances § 26-4 (2017) 15
Pagedale, Mo. Code of Ordinances § 210.750 10
Revised Ordinances of Honolulu, Haw. § 15-24.23 10

OTHER AUTHORITIES

20 Arrested at North Carolina Legislature Protest in April Face Judge, 11 ABC News (Jun. 8, 2017) 16
Amy Wang, *Cops Accidentally Record Themselves Fabricating Charges Against Protester, Lawsuit Says*, Wash. Post (Sept. 20, 2016) 16
Contempt of Cop, POLICE MAGAZINE: COP SLANG http://www.policemag.com/cop-slang/contempt-of-cop.aspx (last visited Dec. 19, 2017) 7
Department of Justice, Investigation of the Baltimore City Police Department (2016) 5
Final Report of the State Police Interview Team (1999) .. 8
First Amended Complaint, *Powers v. City of Ferguson*, No. 16-1299, (E.D. Mo. filed August 9, 2016) 16
John Inazu, *Unlawful Assembly as Social Control*, 64 U.C.L.A. L. Rev. 2 (2017) 12, 13
Letter from Thomas E. Perez, Assistant Attorney General, to William R. Jones, Counsel, Maricopa County Sheriff's Office (Dec. 15, 2011) 5
Second Amended Complaint, *Nylen v. City of Grand Rapids*, No. 17-716, (W.D. Mich. filed Nov. 20, 2017) .. 15
Third Amended Complaint, *Tennart v. City of Baton Rouge*, No. 17-179-JWD-EWD (M.D. La. filed July 13, 2017) 14
United States Department of Justice, Investigation of the Ferguson Police Department (2015) 3, 9, 18
United States Department of Justice, Investigation of the Newark Police Department (2014) 8
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INTEREST OF AMICUS CURIAE[1]

The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at the Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

SUMMARY OF ARGUMENT

"The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987). These words resonate in this moment like never before. Outraged by police violence, protesters have taken to the streets. In Ferguson: "Hands up, don't shoot!" In New York: "I can't breathe!" In Chicago: "Sixteen shots!" Across the nation: "No justice, no peace!"

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

The police have long patrolled protests devoted to other matters, from women's suffrage, to Jim Crow, to wars abroad, but now they are called upon to supervise and control a new wave of protests—demonstrations about *themselves*. This new reality creates a new temptation for police to retaliate against protesters, threatening to erode *Hill*'s line between a "free nation" and a "police state." 482 U.S. at 463.

We show in this brief that police departments from Arizona to Maryland have displayed a pattern and practice of arresting people in retaliation for protected expression. Speech that triggers police retaliation takes two principal forms. First, officers retaliate with arrests when protesters direct their outrage at police misconduct. Second, in "contempt of cop" arrests, police retaliate against people who disagree with or criticize them, effectuating full-blown arrests for technical infractions that would normally result in citation and release or no citation at all.

If a person can be arrested for her speech so long as there happens to be probable cause to arrest her for something else, police will have broad discretion to arrest people whose speech they disfavor. It is easy to find a pretext for arrest because statutes and ordinances forbid a wide range of unremarkable human activity—wearing saggy pants, crossing the street while reading a text message, and barbecuing in a front yard.

More specifically, protesters commonly violate an array of statutes and municipal ordinances that prohibit a wide range of activity, such as blocking sidewalks, unlawful assembly, violating noise ordinances, and disorderly conduct. These laws

extend to so much conduct that the police have probable cause to round up large numbers of protesters. Therefore, if probable cause categorically defeats a retaliatory arrest claim, the police will acquire the power to arrest protesters for the very purpose of silencing disfavored messages.

ARGUMENT

I. ILLEGAL ARRESTS FOR DISFAVORED PROTESTS AND "CONTEMPT OF COP" PRESENT A SYSTEMIC PROBLEM IN MANY LAW ENFORCEMENT AGENCIES.

Recent years have witnessed a series of well-documented findings that certain police departments systemically arrest people in retaliation for their speech. Two types of protected speech commonly trigger retaliatory arrests: (1) protests and demonstrations perceived as "anti-police," and (2) "contempt of cop" encounters in which an officer feels slighted or insulted.

In a 2015 report, the Department of Justice found that "suppression of speech" by the Ferguson, Missouri Police Department (FPD) "reflects a police culture that relies on the exercise of police power—however unlawful—to stifle unwelcome criticism." UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 28 (2015).[2] The report noted that despite a settlement agreement and a consent decree in two separate cases regarding protest activities, "it appears that FPD continues to interfere with individuals'

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[2] Available athttps://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf

rights to protest and record police activities." *Id.* at 27. For example, on February 15, 2015, the six-month anniversary of the death of Michael Brown, "protesters stood peacefully in the police department's parking lot, on the sidewalks in front of it, and across the street." *Id.* The police responded with retaliatory arrests:

> Video footage shows that two FPD vehicles abruptly accelerated from the police parking lot into the street. An officer announced, "everybody here's going to jail," causing the protesters to run. Video shows that as one man recorded the police arresting others, he was arrested for interfering with police action. Officers pushed him to the ground, began handcuffing him, and announced, "stop resisting or you're going to get tased." It appears from the video, however, that the man was neither interfering nor resisting. A protester in a wheelchair who was live streaming the protest was also arrested. . . . Six people were arrested during this incident. It appears that officers' escalation of this incident was unnecessary and in response to derogatory comments written in chalk on the FPD parking lot asphalt and on a police vehicle.

Id. at 27–28.

Similarly, in 2011, the Department of Justice issued a findings letter regarding the Maricopa County Sheriff's Office (MCSO) in Arizona:

> We find that MCSO command staff and deputies have engaged in a pattern or practice of retaliating against individuals for exercising

> their First Amendment right to free speech. Under the direction of Sheriff Arpaio and other command staff, MCSO deputies have sought to silence individuals who have publicly spoken out and participated in protected demonstrations against the policies and practices of MCSO—often over its immigration policies.

Letter from Thomas E. Perez, Assistant Attorney General, to William R. Jones, Counsel, Maricopa County Sheriff's Office, at 13 (Dec. 15, 2011).[3] For example, during two separate meetings of the County Board of Supervisors, deputies arrested several individuals who expressed criticism of the MCSO. *Id.* at 14. None of them were convicted. *Id.* The Department of Justice concluded: "The arrests and harassment undertaken by MCSO have been authorized at the highest levels of the agency and constitute a pattern of retaliatory actions intended to silence MCSO's critics." *Id.*

The Department of Justice made similar findings regarding the Baltimore Police Department in 2016: "BPD violates the First Amendment by retaliating against individuals engaged in constitutionally protected activities. Officers frequently detain and arrest members of the public for engaging in speech the officers perceive to be critical or disrespectful." DEPARTMENT OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 9 (2016).

A recent preliminary injunction decision issued by the United States District Court for the Eastern

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[3] Available at https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf

District of Missouri analyzes the St. Louis Police Department's response to protests triggered by the acquittal of Officer Jason Stockley for the shooting of Anthony Lamar Smith. *Ahmad v. City of St. Louis*, No. 17-cv-2455, 2017 WL 5478410, at *1 (E.D. Mo. Nov. 15, 2017). These protests, which began on September 15, 2017, were directed at both the verdict and "broader issues, including racism and the use of force by police officers." *Id.* "The participants often express[ed] views critical of police." *Id.*

As the protests continued on Sunday, September 17, there were reports of protesters damaging property, and some protesters put on goggles and masks (likely because of concerns about tear gas or mace). *Id.* at *3.

In an illustration of the manner in which very broad laws empower the police to retaliate against speakers, the police declared an "unlawful assembly" and then carried out a mass arrest. *Id.* at *3–5. In fact, Lieutenant Timothy Sachs testified that officers have sole discretion to declare an assembly unlawful and that there are no policies or guidelines defining when it is appropriate to do so. *Id.* at *6.

After declaring an unlawful assembly, and giving orders to disperse, police blocked off points of egress and trapped the protesters in an intersection by marching toward it. *Id.* at *4–5. Then they made a mass arrest of everyone trapped in the intersection, even though the protesters complied with police commands. *Id.* at *5.

Ultimately, the district court issued a preliminary injunction. *Id.* at *17–18. One provision enjoins the police from declaring "an unlawful assembly . . . for the purpose of punishing persons for exercising their

constitutional rights to engage in expressive activity." *Id.* at *18.

One particularly common form of retaliation occurs when police arrest people for what has come to be called "contempt of cop." In these cases, a police officer has probable cause to believe an offense has occurred, but the suspect's speech, perceived as disrespectful, is the real reason the officer arrests her, rather than just citing and releasing her. Notably, *Police Magazine*, which bills itself as "the law enforcement magazine" and a "community for cops[,]" has a glossary of "cop slang" which defines "Contempt of Cop" as "the true underlying behavior of disrespect toward an officer leading to an expensive ticket or arrest for an offense that actually is a law violation." *Contempt of Cop*, POLICE MAGAZINE: COP SLANG, http://www.policemag.com/cop-slang/contempt-of-cop.aspx (last visited Dec. 19, 2017).

A 1999 review of the New Jersey State Police by then-New Jersey Attorney General John J. Farmer documented a common practice of arresting people for "contempt of cop":

> The single most common allegation among all the allegations reviewed was improper attitude and demeanor. This is true in law enforcement nationwide. We observed in several cases a problem which, for lack of a better term, may be called "occupational arrogance." The discussion of this problem is by no means unique to the New Jersey State Police. In fact, internal affairs detectives at one municipal police department, noting its prevalence, termed this phenomenon "contempt of cop." Simply put, it is the tendency for certain police

> officers to approach the public with an attitude that they, the officer, are in no way to be challenged or questioned. Among the cases we reviewed, several seem to illustrate this phenomenon.

FINAL REPORT OF THE STATE POLICE INTERVIEW TEAM 93–94 (1999).[4]

More recently, the Department of Justice found a systemic practice within the Newark Police Department of arresting people for contempt of cop: "The [Newark Police Department's] arrest reports and [internal affairs] investigations . . . reflect numerous instances of the [department's] inappropriate responses to individuals who engage in constitutionally protected First Amendment activity, such as questioning or criticizing police actions." UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 13 (2014).[5] In one instance, for example, "an individual was arrested after he questioned officers' decision to arrest his neighbor." *Id.*

Similarly, in the Ferguson report, the Department of Justice found that police not only retaliated against demonstrators, but also that officers routinely made "contempt of cop" arrests:

> [O]fficers frequently make enforcement decisions based on what subjects say, or how they say it. Just as officers reflexively resort to arrest immediately upon noncompliance with

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[4] Available at https://pdfs.semanticscholar.org/649c/a046a3baca0f9ebafa2641b744c8a2b80e06.pdf

[5] Available at https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf

> their orders, whether lawful or not, they are quick to overreact to challenges and verbal slights. These incidents—sometimes called "contempt of cop" cases—are propelled by officers' belief that arrest is an appropriate response to disrespect.

UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 25 (2015). Notably, the breadth of offenses contained in Feguson's municipal code made it easy to come up with charges: "These arrests are typically charged as a Failure to Comply, Disorderly Conduct, Interference with Officer, or Resisting Arrest." *Id.*

II. BROAD STATUTES AND ORDINANCES MAKE IT ALL TOO EASY FOR POLICE OFFICERS TO FIND PROBABLE CAUSE TO ARREST PEOPLE FOR SPEECH THEY DISLIKE.

If the existence of probable cause, standing alone, defeats a retaliatory arrest claim, the police will acquire vast discretion to punish dissent by rounding up protesters with whom they disagree. Many laws are so broadly written and prohibit so much activity that it is very easy for police to arrest people in retaliation for their speech. In various municipalities across the United States, it is illegal to wear saggy

pants,[6] to cross a street while viewing a cell phone,[7] and to have a barbecue in one's front yard.[8]

This Court has long recognized the threat of censorship posed by laws that endow the police with excessive discretion. In *City of Houston v. Hill*, the Court noted that an ordinance challenged in the case "criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement. The ordinance's plain language is admittedly violated scores of times daily, yet only some individuals—those chosen by the police in their unguided discretion—are arrested." 482 U.S. 451, 466–67 (1987). The *Hill* Court concluded that vast discretion to arrest people for their speech eliminates the "'breathing space' that 'First Amendment freedoms need ... to survive.'" *Id.* at 467 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)); *see also Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J. concurring) ("This

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[6] Abbeville, Louisiana Code of Ordinances § 13-25 ("It shall be unlawful for any person in a public place or in view of the public to wear pants or a skirt in such a manner as to expose their underlying garments."); *see also* William C. Vandivort, Note, *I See London, I See France: The Constitutional Challenge to "Saggy" Pants Laws*, 75 BROOK L. REV. 667, 673 (2009) (cataloging similar saggy pants ordinances across the country).

[7] Revised Ordinances of Honolulu § 15-24.23, https://www.honolulu.gov/rep/site/ocs/roh/ROH_Chapter_15a21_28_.pdf ("No pedestrian shall cross a street or highway while viewing a mobile electronic device.").

[8] Berkeley, Missouri Code of Ordinances § 210.2250 ("Subject to certain exceptions mentioned hereinbelow, no person shall be permitted to barbecue or conduct outdoor cooking in front of the building line of any single-family dwelling, multi-family dwelling or commercial structure."); *see also* Pagedale, Missouri Code of Ordinances § 210.750(A).

ordinance . . . confers on police a virtually unrestrained power to arrest and charge persons with a violation.").

To be sure, the vagueness and overbreadth doctrines provide a partial antidote to laws that confer wide discretion to trench on protected speech. That said, courts cannot be in the business of invalidating every law that prohibits some protected conduct or could be worded more lucidly. "Invalidating any rule on the basis of its hypothetical application to situations not before the Court is 'strong medicine' to be applied 'sparingly and only as a last resort.'" *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 743 (1978) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Some laws are broad enough that the threat of retaliatory enforcement is quite serious, but not so broad as to warrant the "strong medicine" of facial invalidation.

A. Because Laws Affecting Protest Provide Probable Cause For Arrest In A Wide Range Of Circumstances, A Holding That Probable Cause Automatically Defeats A Retaliatory Arrest Claim Would Grant Police Massive Power To Arrest People For Disfavored Speech.

Protesters often violate broad statutes and ordinances that prohibit a wide range of activity, such as blocking sidewalks, unlawful assembly, violating noise ordinances, and disorderly conduct. Because these laws sweep in so much conduct, the police have probable cause to round up large numbers of protesters. If probable cause categorically defeats a retaliatory arrest claim, the police will wield the

power to arrest protesters for the very purpose of silencing disfavored messages.

1. Unlawful Assembly And Failure To Disperse

Under typical "unlawful assembly" ordinances, "officials can disperse a protest as long as they conclude that participants are at some point planning to engage in forceful or violent lawbreaking." John Inazu, *Unlawful Assembly as Social Control*, 64 U.C.L.A. L. Rev. 2, 7 (2017). Because these statutes grant police the power to disperse gatherings that could lead to force or violence, officers "are forced to rely on judgments and inferences about future acts" by protesters or bystanders. *Id.* at 6–7. In fact, some unlawful assembly statutes allow the police to disperse a protest where they believe the demonstrators will engage in an act that is illegal but nonviolent. *Id.* at 7.

The ability to declare an unlawful assembly based solely on predictions about the intent of the protesters, and in the absence of any observed violence or illegality, vests the police with massive discretion to shut down protests. For example, the California Penal Code defines "unlawful assembly" to include two or more people gathering for the purpose of committing an act that is unlawful, but non-violent: "Whenever two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly." Cal. Penal Code § 407.

Unlawful assembly is a misdemeanor. Cal. Penal Code § 408.[9]

Police have used their discretion under unlawful assembly laws to "target citizens across the political spectrum, including civil rights workers, antiabortion demonstrators, labor organizers, environmental groups, Tea Party activists, Occupy protesters, and antiwar protesters." Inazu, *supra*, at 5.

2. Blocking Roads And Sidewalks

State and local governments often prohibit blocking roads, highways, and sidewalks. For example, the Code of the District of Columbia provides that "[i]t is unlawful ... [t]o crowd, obstruct, or incommode ... [t]he use of any street, avenue, [or] alley." D.C. Code § 22–1307(a) (2016).[10]

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[9] *See also* Idaho Code §§ 18-6404, 18-6405 (2017) (stating that the misdemeanor of unlawful assembly occurs "[w]henever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous or tumultuous manner . . ."); Iowa Code § 723.2 (2017) ("An unlawful assembly is three or more persons assembled together, with them or any of them acting in a violent manner, and with intent that they or any of them will commit a public offense. A person who willingly joins in or remains a part of an unlawful assembly, knowing or having reasonable grounds to believe that it is such, commits a simple misdemeanor.").

[10] *See also* Ga. Stat. § 16-11-43 (2017) ("A person who, without authority of law, purposely or recklessly obstructs any highway, street, sidewalk, or other public passage in such a way as to render it impassable without unreasonable inconvenience or hazard and fails or refuses to remove the obstruction after receiving a reasonable official request or the order of a peace officer that he do so, is guilty of a misdemeanor."); La. Rev. Stat. § 14:97 (2017) ("Simple obstruction of a highway of commerce is the intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable

The police use these laws to arrest protesters. For example, following the police shooting of Alton Sterling, police arrested numerous protesters in Baton Rouge under Louisiana's obstruction of a highway law. Third Amended Complaint, *Tennart v. City of Baton Rouge*, No. 17-179-JWD-EWD, at 4-6 (M.D. La. filed July 13, 2017). The plaintiffs in the *Tennart* case allege that they were arrested on "the pretext that the protesters had violated a state law proscribing obstruction of highways and public roads." *Id.* at 3.[11]

3. Disorderly Conduct Ordinances

Police also arrest protesters under disorderly conduct ordinances. In *Lewis v. City of Tulsa*, "prolife activists were picketing an abortion clinic." 775 P.2d 821, 822 (Okla. Crim. App. 1989). Clayton Lewis and other activists stood 50-60 feet away from the entrance to the clinic and yelled at people entering that "it was murder. You should feel guilty about what you are doing." *Id.* For these lawful activities, Mr. Lewis was arrested and convicted under Tulsa's disorderly conduct ordinance. *Id.* The Oklahoma Court of Criminal Appeals ultimately reversed his conviction. *Id.*

4. Noise Ordinances

Noise ordinances typically impose limits on the amplification of sound. For example, the Chicago Municipal Code provides:

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waterway, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult.")

[11] Roderick and Solange MacArthur Justice Center attorneys are among the counsel for the *Tennart* plaintiffs.

> No person on the public way shall employ any device or instrument that creates or amplifies sound, including but not limited to any loudspeaker, bullhorn, amplifier, public address system, musical instrument, radio or device that plays recorded music, to generate any sound, for the purpose of communication or entertainment, that is louder than average conversational level at a distance of 100 feet or more, measured vertically or horizontally, from the source.

Chicago Mun. Code § 8-32-070(a) (2017).[12]

Police often use noise and amplification provisions to arrest protesters. For example, Stephen Nylen, a devout Christian and Iraq war veteran, alleges in a case proceeding in the United States District Court for the Western District of Michigan that police have repeatedly threatened him with arrest under a noise and amplification ordinance. Second Amended Compl., *Nylen v. City of Grand Rapids*, No. 17-cv-716, at 5 (W.D. Mich. filed Nov. 20, 2017). Roughly half of these arrest threats occurred while Mr. Nylen was speaking about his faith on a public sidewalk near an abortion clinic. *Id.* at 5.

Similarly, in the aftermath of the shooting of Michael Brown in Ferguson, Missouri, three plaintiffs

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[12] *See also, e.g.*, Norfolk Code of Ordinances § 26-4 (2017) ("Operating, playing or permitting the operation or playing of any . . . bullhorn, megaphone, sound amplifier or similar device which produces, reproduces or amplifies sound in such a manner as to create noise disturbance across a real property line boundary or within a noise sensitive zone set forth in table I, 'Maximum Sound Pressure Levels,' shall constitute a violation of this section, unless allowed pursuant to an exception established by ordinance.").

were arrested for failure to comply with a police order during a peaceful protest that followed a candlelight vigil. First Amended Compl., *Powers v. City of Ferguson*, No. 16-cv-1299, at 4 (E.D. Mo. filed August 9, 2016). Three days later, another plaintiff was arrested for violating a noise ordinance while waiting for the police to release Antonio French, an alderman arrested during the protests. Powers was acquitted of the charges at trial. *Id.* at 5. In 2015, protesters demanding expanded Medicaid coverage were threatened with arrest for noise violations for singing outside the chambers of the Florida House of Representatives. *20 Arrested at North Carolina Legislature Protest in April Face Judge*, 11 ABC News (Jun. 8, 2017).[13]

B. Police Officers Exploit The Discretion Created By Broad Laws By Arresting Protesters With Whom They Disagree.

Police officers have used the discretion provided by broad statutes and ordinances to retaliate against speakers with whom they disagree. For example, in September of 2015, Michael Picard was protesting legally near a DUI checkpoint with a sign that read "Cops Ahead. Keep Calm and Remain Silent." Amy Wang, *Cops Accidentally Record Themselves Fabricating Charges Against Protester, Lawsuit Says*, Wash. Post (Sept. 20, 2016). He was also legally recording the police with his cell phone. *Id.* One of the officers slapped Picard's cell phone out of his hand and confiscated it. *Id.* The officer inadvertently allowed the cell phone camera to continue recording as he and other officers discussed charging Picard. *Id.*

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[13] *Available at* http://abc11.com/politics/20-arrested-at-nc-legislature-face-judge/772567/.

The transcript of the video provides a rare glimpse into how police officers (in this case, Master Sergeant Patrick Torneo, Sergeant John Jacobi, and Trooper John Barone) sometimes fabricate charges to retaliate against a protester. Torneo is heard saying: "Have that Hartford lieutenant call me, I want to see if he's got any grudges."[14] Barone asks: "You want me to punch a number [slang for opening an investigation] on this either way? Gotta cover our ass."[15]

The officers proceed to debate how to charge Picard, illustrating how broad statutes and ordinances often grant the police vast discretion to effectuate retaliatory arrests:

> Jacobi: So, we can hit him with reckless use of the highway by a pedestrian and creating a public disturbance, and whatever he said.
>
> Barone: That's a ticket?
>
> Jacobi: Two tickets.
>
> Barone: Yeah.
>
> Jacobi: That's a ticket with two terms, yeah. It's 53a-53-181, something like that for—

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[14] The full video is available here: https://www.washingtonpost.com/news/post-nation/wp/2016/09/20/cops-accidentally-record-themselves-fabricating-charges-against-protester-lawsuit-says/?utm_term=.2c20c7258090.

[15] *See supra* n.14.

Barone: I'll hit him with that, I'll give him a ticket for that.

Jacobi: Crap! I mean, we can hit him with creating a public disturbance.

Jacobi: All three are tickets-

Torneo: Yep.

Jacobi: We'll throw all charges three on the ticket.

Torneo: And then we claim that, um, in backup, we had multiple people, um, they didn't want to stay and give us a statement, so we took our own course of action. [16]

The Department of Justice Ferguson report also illustrates the phenomenon of police creatively charging people in order to retaliate against them for protected speech. In one case, "a police officer arrested a business owner on charges of Interfering in Police Business and Misuse of 911 because she objected to the officer's detention of her employee." UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 25 (2015). Indeed, the officer made the arrest after the business owner attempted to call the police chief, which "suggests that [the officer] may have been retaliating against her for reporting his conduct." *Id.* In another instance, an officer arrested a man for violating an extremely

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[16] *See supra* n.14.

broad "Manner of Walking in Roadway" ordinance because the man cursed at the officer. *Id.*

Similarly, in *Allee v. Medrano*, this Court found a "persistent pattern of police misconduct," in the enforcement of Texas statutes, including an unlawful assembly law, against activists seeking to organize a farmworkers' union. 416 U.S. 802, 815 (1974). The Court noted that the district court found that "the defendants selectively enforced the unlawful assembly law ... treating as criminal an inoffensive union gathering...." *Id.* at 808 (citation omitted).

The *Ahmad* decision regarding the September 2017 protests in St. Louis provides a more recent illustration of a police officer's broad discretion to effectuate arrests under unlawful assembly laws. The court noted that, in St. Louis, "an individual officer can decide, in his or her discretion, to declare an unlawful assembly, and there are no guidelines, rules, or written policies with regard to when an unlawful assembly should be declared." 2017 WL 5478410, at *6.

In *Ford v. City of Yakima*, 706 F.3d 1188, 1191 (9th Cir. 2013), an officer arrested and jailed a motorcyclist under a noise ordinance. The officer decided to make the arrest because he became irritated with the motorist for (lawfully) talking back. *Id.* at 1190–91. Prior to the arrest, the officer made a series of statements that included, "[i]f you run your mouth, I will book you in jail for it. Yes, I will, and I will tow your car," and "[i]f you have diarrhea of the mouth, you will go to jail." *Id.* The officer also said: "A lot of times we tend to cite and release people for [noise ordinance violations] or we give warnings. However ... you acted a fool ... and we have discretion whether we

can book or release you. You talked yourself—your mouth and your attitude talked you into jail." *Id.*

CONCLUSION

In protests against the police, some see courage and dissent, while others see insult, exaggeration, and ingratitude. The freedom of expression lives and breathes in that clash of ideologies, which reflect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The present conflict of ideas must be resolved, as others in our history have been, through public discourse—not through retaliatory arrests made to silence dissent. For that reason, this Court should reverse the judgment below.

Respectfully submitted,

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December 27, 2017

Marissa Spalding

From: David M Shapiro
Sent: Saturday, December 16, 2017 11:40 AM
To: emily.clark@macarthurjustice.org; Marissa Spalding
Subject: Fwd: Lozman v. City of Rivera Beach

Follow Up Flag: Flag for follow up
Flag Status: Completed

Consents in lozman.

Sent from my iPhone

Begin forwarded message:

From: "Dvoretzky, Shay" <sdvoretzky@JonesDay.com>
Date: December 15, 2017 at 4:31:12 PM CST
To: Pamela S Karlan <pkarlan@stanford.edu>, David M Shapiro <david.shapiro@law.northwestern.edu>
Subject: RE: Lozman v. City of Rivera Beach

Respondent consents as well.

Shay Dvoretzky
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From: Pamela S Karlan [mailto:pkarlan@stanford.edu]
Sent: Friday, December 15, 2017 4:51 PM
To: David M Shapiro <david.shapiro@law.northwestern.edu>; Dvoretzky, Shay <sdvoretzky@JonesDay.com>
Subject: Re: Lozman v. City of Rivera Beach

Dear Mr. Shapiro,

I consent on behalf of petitioner.

Pamela S. Karlan
Kenneth and Harle Montgomery Professor of Public Interest Law
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From: David M Shapiro <david.shapiro@law.northwestern.edu>
Sent: Friday, December 15, 2017 1:00 PM
To: Pamela S Karlan; sdvoretzky@jonesday.com
Subject: Lozman v. City of Rivera Beach

Dear Counsel:
The MacArthur Justice Center intends to file an amicus brief in this case. Please let me know if you consent. Thanks.
Sincerely,
David Shapiro

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